Supreme Court, U.S.
FILED

No. 10-995

FEB 1 - 2011
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In The
Supreme Court of the United States

PA PRISON SOCIETY,

Petitioner,

v

PEDRO A. CORTES, Secretary, Commonwealth of Pennsylvania; HONORABLE EDWARD G. RENDELL; JOSEPH B. SCARNATI, Lt. Governor; THOMAS W CORBETT, JR.; LOUISE B WILLIAMS; RUSSELL A. WALSH, Ph.D.; and JOHN WETZEL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law that was expressly intended to substantially reduce the possibility of parole for life-sentenced inmates, and which in operation has the intended effect, violates the Ex Post Facto Clause.

PARTIES TO THE PROCEEDINGS

Petitioner (Petitioner and Appellant below):

PA Prison Society

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CORPORATE DISCLOSURE

Petitioner PA Prison Society is a 501(c)(3) not-for-profit corporation under the laws of the Commonwealth of Pennsylvania and as such has no parent corporation and there are no stocks held by PA Prison Society or by any publicly held corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

CITATIONS FOR OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL PROVISION AT ISSUE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 6

CONCLUSION 14

APPENDIX

Opinion and Judgment, Third Circuit Court of Appeals, October 1, 2010 ..... App. 1

Memorandum and Order, United States District Court, June 11, 2009 ..... App. 77

Order Denying Petition for Rehearing En Banc, Third Circuit Court of Appeals, November 23, 2010 ..... App. 121

TABLE OF AUTHORITIES

Page

California Department of Corrections v. Morales, 514 U.S. 499 (1995) 7, 13

Cimiaszewski v. Board of Probation and Parole, 868 A.2d 416 (Pa. 2005) 12

Commonwealth ex rel. Banks v. Cain, 345 Pa. 581 (1942) 10

DeFoy v. McCullough, 393 F.3d 439 (3d Cir. 2005) 12

Dobbert v. Florida, 432 U.S. 282 (1977) 13

Garner v. Jones, 529 U.S. 244 (2000) 7, 12, 13

Lindsey v. Washington, 301 U.S. 397 (1937) 12

Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003) 2, 11, 12

Pa. Prison Society v. Commonwealth, 727 A.2d 632 (Pa. Cmwlth. 1999), rev'd, 776 A.2d 971 (Pa. 2001) 4

Pa. Prison Society v. Commonwealth, 776 A.2d 971 (Pa. 2001) 3, 5, 8, 9

Pa. Prison Society v. Cortes, 2009 U.S. Dist. LEXIS 48995 (M.D. Pa. June 11, 2009) 5

PA Prison Society v. Cortes, 508 F.3d 156 (3d Cir. 2007) 9

PA Prison Society v. Cortes, 622 F.3d 215 (3d Cir. 2010) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Pa. Prison Society v. Rendell, 419 F. Supp. 2d 651 (M.D. Pa. 2006) 5, 6

United States v. Wilson, 32 U.S. 150 (1833).....10

Weaver v. Graham, 450 U.S. 24 (1981).....12, 13

Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Cmwlth. 1997) 12

OTHER AUTHORITIES

Arthur W. Campbell, *Law of Sentencing* (3d ed. 2004) 12

CITATIONS FOR OPINIONS BELOW

The Opinion of the Third Circuit Court of Appeals, July 2, 2010 is reported at 622 F.3d 215 (3d Cir. 2010). The Memorandum and Order of the United States District Court, January 8, 2009 is at 2009 U.S. Dist. LEXIS 48995 (M.D. Pa. June 11, 2009).

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals denied a Petition for Rehearing *en banc* on November 23, 2010. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review by writ of certiorari the judgment of the Court of Appeals.

CONSTITUTIONAL PROVISION AT ISSUE

Article I, §10 of the United States Constitution provides that "no ... ex post facto law shall be passed."

STATEMENT OF THE CASE

This case presents a uniquely compelling claim of a violation of the Ex Post Facto Clause. In 1997, Pennsylvania enacted a Constitutional Amendment which, by the official explanation of the Attorney General of Pennsylvania, was expressly intended to make it more difficult for life sentenced inmates to

obtain commutation of their sentences and release on parole. Yet, despite the intent and proven impact of the law in significantly reducing the chances for commutation and parole, the court of appeals determined that there was no ex post facto violation.

Article IV, §9(a) of the Pennsylvania Constitution provides the process by which life sentenced inmates may seek commutation of their sentences and release on life parole. Although life sentences in Pennsylvania are without parole, parole may be obtained through the commutation process. The inmate first applies to the Pennsylvania Board of Pardons for commutation of the life sentence to a life sentence with parole. Only if the Board of Pardons votes to recommend commutation will the case be sent to the Governor for ultimate determination. If the Governor grants commutation of a life sentence, the prisoner must apply to the Board of Parole to be released on life parole. Historically, the Parole Board invariably grants parole to commuted lifers. *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 385 (3d Cir. 2003).

Prior to November 4, 1997, Article IV, §9(a) of the Constitution of the Commonwealth of Pennsylvania provided in relevant part, that:

> In all criminal cases except impeachment the Governor shall have the power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a

> *majority of the Board of Pardons*, after full hearing in open session, upon public notice. . . .

Pa. Const. Art. IV, §9(a) (emphasis added).

In 1997, a ballot question proposing an amendment to the Constitution was submitted to voters, the purpose of which was stated in the official explanatory statement of the Attorney General: "the effect of the Ballot Question would be to make it more difficult for an individual sentenced to . . . life imprisonment to obtain a . . . commutation of sentence." *Pa. Prison Society v. Commonwealth*, 776 A.2d 971, 983-984 (Pa. 2001). Release on parole under the proposed Amendment would require a *unanimous* as opposed to a majority vote of the Board. The 1997 Amendment was motivated by a 1994 incident. Reginald McFadden, a prisoner sentenced to life imprisonment who had been granted commutation by the Governor and released on parole, after a majority of the Board of Pardons voted to recommend it, committed a murder in the State of New York. (Second Amended Compl. ¶26).

On November 4, 1997, Pennsylvania voters approved the ballot measure. Article IV, §9(a) of the Constitution of the Commonwealth of Pennsylvania was amended to read as follows:

> In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon

> shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the *unanimous recommendation in writing of the Board of Pardons*, after full hearing in open session, upon due public notice. (Emphasis added).

This action was originally brought as a petition for review in the Commonwealth Court of Pennsylvania on October 16, 1997, challenging the constitutionality of the ballot question before it was submitted to the voters. *Pa. Prison Society v. Commonwealth*, 727 A.2d 632, 635 (Pa. Cmwlth. 1999), *rev'd*, 776 A.2d 971 (Pa. 2001).

After the 1997 Amendment was approved, the Commonwealth removed the action to the United States District Court for the Middle District of Pennsylvania. Plaintiffs filed an amended complaint alleging that the 1997 Amendment violated various provisions of the United States Constitution. On January 15, 1998, the District Court granted a joint motion to remand the state law claims and to stay the federal claims pending resolution of the state law claims.

The Commonwealth Court determined on state law grounds that the vote on the ballot question was invalid. *Pa. Prison Society v. Commonwealth*, 727 A.2d at 636. On July 25, 2001, the Supreme Court of Pennsylvania reversed the Commonwealth Court and

upheld the 1997 Amendment. *Pa. Prison Society v. Commonwealth*, 776 A.2d at 981-983.

Plaintiffs filed a second amended complaint in the District Court presenting federal and state constitutional challenges to the 1997 Amendment, including an ex post facto claim for prisoners sentenced to life imprisonment prior to the effective date of the 1997 Amendment.

The district court denied the motion to dismiss the ex post facto claim regarding the change from majority to unanimous vote and, after further proceedings, granted the Plaintiffs' Motion for Summary Judgment, holding that the new requirement of Board unanimity in recommending parole for prisoners sentenced to life imprisonment who had committed their crimes before the 1997 Amendment's effective date violated the Ex Post Facto Clause. *Pa. Prison Society v. Rendell*, 419 F. Supp. 2d 651, 662 (M.D. Pa. 2006).

On appeal to the Third Circuit, the Commonwealth argued for the first time that the district court lacked jurisdiction over the claims because none of the Plaintiffs had standing under Article III. The Third Circuit remanded the case for a determination of the standing issue.

On remand, the district court determined that the Pennsylvania Prison Society "satisfie[d] all of the requirements needed to qualify for the organizational exception to the prohibition on third party standing." *Pa. Prison Society v. Cortes*, 2009 U.S. Dist. LEXIS

48995 *4 (M.D. Pa. June 11, 2009). The district court again concluded that the 1997 Amendment violates the Ex Post Facto Clause. The district court considered evidence drawn from the new law's practical implementation, i.e., an analysis of commutations granted to life sentenced inmates in Pennsylvania between 1970 and 2005.

The court concluded that the retroactive application of the 1997 Amendment posed an impermissible "significant risk" of increased punishment to those inmates sentenced to life imprisonment before the effective date of the Amendment. *Id. See also*, 419 F. Supp. 2d at 658, 660-661 n.1 & n.2. On appeal, the Court of Appeals agreed that Petitioner had standing to raise the Ex Post Facto claim, but on the merits reversed the district court's judgment granting relief on this claim. *PA Prison Society v. Cortes*, 622 F.3d 215 (3d Cir. 2010). On November 23, 2010, the Court denied a petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari as the court of appeals engaged in an ex post facto analysis that is completely in conflict with this Court's jurisprudence. This Court has made clear that changes in parole procedures that create a "significant risk for increased punishment" implicate Ex Post Facto rights and that the "presence of discretion" in the parole proceedings "does not displace the

protections of the Ex Post Facto Clause." *Garner v. Jones*, 529 U.S. 244, 253, 257 (2000). *See also, California Department of Corrections v. Morales*, 514 U.S. 499 (1995). In *Garner*, this Court ruled that a new law extending the period for parole review after an initial denial did not violate Ex Post Facto principles if an expedited hearing was available on a showing of changed circumstances. In *Morales*, the claim was also rejected as the change in the frequency of parole hearings from one to three years for a discrete class (those convicted of *more* than one murder and who had been initially refused parole) was not likely to increase punishment.

The contrast between the "speculative and attenuated risk of increasing the measure of punishment" in those cases, *Morales*, 519 U.S. at 524, and the *intended* and *proven* impact of the Pennsylvania law could not be more dramatic. The Amendment in this case was drafted and enacted with a single purpose in mind: to make it more difficult for life sentenced inmates to secure commutation and release on parole. The Amendment changed the basic structure for parole for life sentenced prisoners in Pennsylvania by eliminating any opportunity for the Governor to grant commutation (allowing for life on parole) unless there first was a unanimous Pardons Board recommendation. Whatever difficulties inhere in other cases in determining whether changes in parole processes violate the Ex Post Facto Clause, where the express intent of the change is to make more difficult release

on parole, the constitutional violation is plainly established.

The record in this case fully supports the claim that the Amendment seriously disadvantages life sentenced inmates seeking commutation and parole. First, as noted, the *express* purpose of the Amendment was to make it more difficult for life sentenced inmates to obtain release on parole. As the official "explanatory statement" of the Attorney General of Pennsylvania with respect to the Amendment (which appeared on the ballot) stated:

> **The effect of the ballot question would be to make it more difficult for an individual sentenced to death or life imprisonment to obtain a pardon or commutation of sentence**, to ease the process for Senate approval of the Governor's appointments to the Board of Pardons, and to ensure that crime victims are represented on the Board.

Pa. Prison Society v. Commonwealth, 776 A.2d 971, 983-84 (Pa. 2001) (emphasis added).[1]

Second, the record developed in the trial court demonstrates that consistent with the intent of the

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[1] Indeed, the Pennsylvania Supreme Court ruled that this statement so clearly reflected the intent of the law to make commutation and parole for life sentenced inmates more difficult that it satisfied the "plain English" explanatory requirement of the constitutional amendment process. *Id.*

Amendment, the effect has been to create a substantial risk of increased punishment for life sentenced inmates seeking commutation and parole. Pre-Amendment, the Board of Pardons recommended commutation for numerous life sentenced inmates based on a majority vote. As documented in the district court, for the ten years preceding the Amendment, of the 126 Board of Pardons recommendations for commutation, 59, or 46.8%, were made by a majority vote. A. 354-358. Indeed, in the first appeal of this case, on the issue of standing, the court of appeals recognized that "a showing of a 3-2 or 4-1 vote of the Board could demonstrate that a plaintiff was injured by the 1997 Amendment." *PA Prison Society v. Cortes*, 508 F.3d 156, 165 (3d Cir. 2007) (footnote omitted).

In the post-Amendment period, two life sentenced inmates, Smith and Thompson, who had previously received 4-1 majority votes for commutation, were rejected on identical votes as a result of the new unanimity requirement. *PA Prison Society v. Cortes*, 622 F.3d at 228-232. The Amendment permits any single member of the Board of Pardons to prevent parole for the applicant, a change in law that plainly increases the risk of increased punishment by denial of parole release.[2]

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[2] The Amendment also changed pre-existing law by requiring that one member of the Pardons Board be a "crime victim." *Pa. Prison Society*, 776 A.2d at 974

The Third Circuit attempted to avoid the Ex Post Facto claim by characterizing the new law as a change in *pardon* as opposed to parole procedures. E.g., 622 F.3d at 221, 238, 239-243, 245-246. However, in Pennsylvania the factors that govern pardons are entirely different from those that control commutation and parole for life sentenced inmates. As the Pennsylvania Supreme Court has consistently ruled, "pardons" are full clemency granted by the Governor. A pardon "completely frees the offender from the control of the state." *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 584-85 (1942). *See also United States v. Wilson*, 32 U.S. 150, 160-61 (1833) (a pardon "exempts the individual . . . from the punishment the law inflicts for the crime he has committed").

By distinct contrast, the commutation process for life sentenced inmates does not "discharge" or "free" an inmate from the penal consequences of his crime. The commuted lifer can only be released on parole for life, subject to incarceration for a parole violation. *Banks*, *supra*, at 585. The regulations of the Respondent Board of Pardons make the same point. Under 37 Pa. Code §81.202, commutation is defined as the "reduction of a legal penalty or punishment, and §81.211 provides that 'the Board hears and acts upon applications for . . . (2) commutation of sentences including (ii) life imprisonment on parole.'" For those inmates serving life sentences who are affected by the 1997 Amendment, the only realistic relief available is commutation and parole.

None of the inmates who have challenged the new law have sought a "pardon;" rather, they all seek commutation of their sentences to life parole. The commutation process for life sentenced inmates has *none* of the attributes of a pardon system, but it shares all relevant parole considerations: legal guilt is not absolved; the prisoner is released on parole for the remainder of the sentence; the prisoner is subject to re-incarceration for the remainder of his initial sentence if he violates parole; and release from prison can be obtained only by a vote of the Parole Board.

If the Board of Pardons recommends commutation and the Governor concurs, the inmate is then *eligible* for release on life parole by the Parole Board. And, as an historical matter, the Parole Board almost always grants parole. *See Mickens-Thomas v. Vaughn*, 321 F.3d at 385. In other words, the commutation process is the *means by which* life sentenced inmates may be paroled.

Accordingly, the basic premise that drives the panel's legal analysis – that the Amendment affects only the pardon process in Pennsylvania – is inescapably incorrect under Pennsylvania law. Unfortunately, having started with a false premise, the panel's ultimate legal conclusion which rests on the asserted difference of Ex Post Facto standards for pardon and parole laws is erroneous as well. The court's main point is that the pardon process involves the almost unlimited discretionary power of the Governor. 622 F.3d at 239-244. However, in Pennsylvania, as elsewhere, there is "virtually . . . unreviewable power to

grant or deny the parole application." *Mickens-Thomas v. Vaughn*, 321 F.3d at 377; *Weaver v. Pennsylvania Board of Probation and Parole*, 688 A.2d 766, 770 (Pa. Cmwlth. 1997) (en banc) (same).[3]

Moreover, this Court has made clear that the loss of discretion may violate Ex Post Facto principles. *See, e.g., Garner v. Jones*, 529 U.S. at 253; *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Lindsey v. Washington*, 301 U.S. 397, 402 (1937) (where new law imposed mandatory sentence of fifteen years, it "is plainly to the disadvantage of petitioners to be denied of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term."). As this case involves a change in the commutation and *parole* process, the proper question is whether the changes for life sentenced inmates "disadvantage" them by creating a substantial risk that their chances for parole will be diminished. The court of appeals asserted that the Amendment "only concerns a change in the voting procedures" and was therefore "procedural" in nature. 622 F.3d at 247. This Court has rejected this formalistic analysis and has concluded that a change is "procedural" only upon a careful

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[3] Pennsylvania only permits challenges to parole refusals on ex post facto grounds. *Cimiaszewski v Board of Probation and Parole*, 868 A.2d 416, 421-22 (Pa 2005), *DeFoy v. McCullough*, 393 F.3d 439, 445 (3d Cir. 2005). *See also*, Arthur W. Campbell, *Law of Sentencing*, 628 (3d ed. 2004) ("American courts prefer a hands-off policy toward decisions to grant or deny parole.")

determination that the new law does not materially disadvantage the defendant or inmate. *See Dobbert v. Florida*, 432 U.S. 282 (1977) (procedural change as to role of judge or jury in sentencing does not increase punishment or change the elements of the offense). Significantly, this Court in *Morales* and *Garner* made clear that so-called "procedural" changes may well violate the Ex Post Facto Clause.

Finally, the assertion by the court of appeals that there can be no Ex Post Facto violation because the Amendment did not lengthen the sentence imposed, 622 F.3d at 234, is in direct conflict with this Court's decision in *Garner*. 529 U.S. at 244. Petitioner alleged and proved that the Amendment seriously adversely affected the chances of life sentenced inmates to secure release on parole, and this Court has specifically ruled that "a reduced opportunity to shorten . . . time in prison" supports an Ex Post Facto claim. *Weaver v. Graham*, 450 U.S. at 33-34. Under the Ex Post Facto Clause, the Amendment cannot be applied in a retroactive manner.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-3017

PA PRISON SOCIETY; JULIA D. HALL; GREGORY H. KNIGHT; FIGHT FOR LIFERS INC; WILLIAM GOLDSBY; JOAN PORTER; GRATERFRIENDS INC.; JOAN F. GAUKER; VINCENT JOHNSON; FRIENDS COMMITTEE TO ABOLISH THE DEATH PENALTY INC.; KURT ROSENBERG; PENNSYLVANIA ABOLITIONISTS UNITED AGAINST THE DEATH PENALTY; TERRY RUMSEY; ROGER BUEHL; DOUGLAS HOLLIS; DIANNA HOLLIS

v.

PEDRO A. CORTES, Secretary, Commonwealth of Pennsylvania; HONORABLE EDWARD G. RENDELL; JOSEPH B. SCARNATI, LT GOVERNOR; THOMAS W. CORBETT, JR.; LOUISE B. WILLIAMS; RUSSELL A. WALSH, PhD.; JOHN E. WETZEL

(Pursuant to Fed. R. App. P. 43)

Joseph B. Scarnati,
Thomas W. Corbett,
Louise B. Williams,
Russell A. Walsh,
John E. Wetzel,
Appellants.

App. 2

No. 09-3018

PENNSYLVANIA PRISON SOCIETY;
DOUGLAS HOLLIS; PAROLE PLAINTIFFS,
KEITH SMITH, JACKIE LEE THOMPSON

(Pursuant to F.R.A.P. 12(A))

v.

PEDRO A. CORTES; HONORABLE EDWARD
G. RENDELL; JOSEPH B. SCARNATI,
LT. GOVERNOR; THOMAS W. CORBETT, JR.;
LOUISE B. WILLIAMS; RUSSELL A.
WALSH, Ph.D.; JOHN A. WETZEL

Pennsylvania Prison Society,
Douglas Hollis,
Keith Smith,
Jackie Lee Thompson,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 1-97-cv-01731)
District Judge: Honorable A. Richard Caputo

Argued April 19, 2010
Before: SCIRICA AMBRO and
ALARCÓN*, Circuit Judges

(Filed: October 1, 2010)

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OPINION OF THE COURT

ALARCÓN, Circuit Judge.

---

* Honorable Arthur L Alarcón, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation

We are asked to decide whether an amendment to Article IV, § 9(a) of the Constitution of the Commonwealth of Pennsylvania, that alters the voting procedures employed by the Pennsylvania Board of Pardons to require unanimity in recommending pardons and commutations for life-sentenced prisoners to the Governor, violates the *Ex Post Facto* Clause of the United States Constitution.

The District Court ruled that the constitutional amendment, passed by Pennsylvania voters in 1997 ("1997 Amendment"), violates the *Ex Post Facto* Clause for prisoners sentenced to a term of life imprisonment prior to its effective date. Because none of the prisoners who are seeking relief in this action has shown that there is a significant risk the 1997 Amendment will increase the length of their punishment, an element essential to establishing an *ex post facto* violation, Plaintiffs have failed to state a viable claim. We will therefore reverse and remand with instructions to dismiss the *ex post facto* action.

I

Under the Constitution of the Commonwealth of Pennsylvania, the Governor is empowered "in all criminal cases except impeachment . . . to grant reprieves, commutation of sentences and pardons. . . ." Pa. Const. art. IV, § 9(a). "Like Article II of the U. S. Constitution, Article IV of the Pennsylvania Constitution delineates powers of the executive branch." *Pa. Prison Soc'y v. Cortés*, 508 F.3d 156, 159 n.4 (3d Cir.

2007) ("*Prison Society I*"). The Governor's decision whether to commute a sentence is based upon recommendations made by the Pennsylvania Board of Pardons ("the Board of Pardons"), also part of the executive branch. Pa. Const. art. IV, § 9(b)[1]; *see also Commonwealth ex rel. Cater v. Myers,* 412 Pa. 67, 71 (1963) ("The Board of Pardons is a board of clemency which is constitutionally ordained to recommend to the Governor of Pennsylvania the grant or denial of clemency, i.e., commutation of sentence or pardon of persons who have been convicted of and sentenced for crime.").[2]

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[1] Prior to its amendment, Pa. Const. art. IV, § 9(b) provided.

> The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of two-thirds or a majority of the members elected to the Senate as is specified by law for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania and shall be recognized leaders in their fields; one shall be a member of the bar, one a penologist, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

Pa. Const. art. IV, § 9(b) (amended 1997)

[2] While commutations of sentences and pardons for persons convicted of crimes are both acts carried out by the Governor of Pennsylvania under his or her clemency power, the issue relevant in this appeal involves only actions taken by the Board of Pardons on applications for commutation by inmates sentenced to life imprisonment without parole.

Prior to November 4, 1997, Article IV, § 9(a) of the Constitution of the Commonwealth of Pennsylvania provided, in relevant part, that:

> In all criminal cases except impeachment the Governor shall have the power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing **of a majority** of the Board of Pardons, after full hearing in open session, upon public notice. . . .

Pa. Const. art. IV, § 9(a) (amended 1997) (emphasis added).

In 1997, a ballot question proposing an amendment to the constitution that would alter the composition of and voting procedures employed by the Board of Pardons was scheduled to be submitted to Pennsylvania voters. The proposed ballot question read:

> Shall the Pennsylvania Constitution be amended to require a unanimous recommendation of the Board of Pardons before the Governor can pardon or commute the sentence of an individual sentenced in a criminal case to death or life imprisonment, to require only a majority vote of the Senate to approve the Governor's appointments to the Board, and to substitute a crime victim for an attorney and a corrections expert for a penologist as Board members?

Pa. Prison Soc'y v. Commonwealth, 565 Pa. 526, 532 (2001). The 1997 Amendment of the Board of Pardons' procedures was motivated by a 1994 incident in which Reginald McFadden, a prisoner sentenced to life imprisonment who had been granted commutation by the Governor, after a majority of the Board of Pardons voted to recommend it, committed a new murder in the State of New York. (2d Amend Compl. ¶ 26); *see also Hearings on Pennsylvania Board of Probation and Parole Reforms Before the House Judiciary Comm.,* 1995 Gen. Assembly 179th Sess. (Pa. June 9, 1995); S. of Pa. Judiciary Comm., Chairman's Rep. Investigation into the Parole of Robert Simon, 1995 Gen. Assembly, 179th Sess. 1-6 (Pa. 1996); (Appellants' Br. 19 (citing A000522-A000525, testimony of Mark Singel)); Appellees' Br. 43.)[3].

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[3] *See also Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders,* 5 Widener J Pub L. 269 (1996), discussing the McFadden case

> One of the most sensational cases of early release was that of Reginald McFadden McFadden was pardoned after serving less than twenty-five years of a life sentence for murdering a sixty-year-old Philadelphia woman Ninety-two days after his July 7, 1994, release to New York State, under the interstate parole system, McFadden was charged with, and later convicted of, beating and raping a fifty-five-year-old South Nyack woman He was also charged with raping and murdering a seventy-eight[-]year[-]old Long Island woman. Marlene Aig, *24 Years, A Convict, He Played the System,* PITTSBURGH POST GAZETTE, May 30, 1995, at C 1 More recently, McFadden was convicted of the murder of a forty-two-year-old Long

(Continued on following page)

On November 4, 1997, Pennsylvania voters approved the ballot measure. Article IV, § 9(a) of the Constitution of the Commonwealth of Pennsylvania was amended to read as follows:

> In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice.

Pa. Const., art. IV, § 9(a). Accordingly, the 1997 Amendment changed the number of votes needed to support the Pardon Board's recommendation to the Governor that a life sentence be commuted to a term of years with the possibility of parole from majority to unanimous and substituted a crime victim instead of an attorney and a corrections expert instead of a penologist as Board members.

> Island man *Convicted Murderer Found Guilty Again,* HARRISBURG PATRIOT EVENING NEWS, Mar 14, 1996, at B4. Because parole is not available to persons sentenced to life imprisonment, McFadden was released through the pardon process

Id. at 296 n.95.

A

Pennsylvania law distinguishes between the exercise of the Governor's clemency power to grant pardons and commutations pursuant to the Constitution of the Commonwealth, and the authority to release a prisoner on parole, which is an independent function of the Board of Probation and Parole. Unlike the Board of Pardons, which is constitutionally mandated and operates as a function of the Pennsylvania Department of Justice, 71 Pa. Cons. Stat. § 12, the Pennsylvania Board of Probation and Parole is an independent board, originally created by the Parole Act of 1941. *See* Parole Act of 1941, 1941 Pa. Laws 861 (codified as amended at 61 Pa. Stat. Ann. §§ 331.1-.21 *repealed by* Act of Aug. 11, 2009, ch. 61, 2009 Pa. Laws 33). The Parole Act states that "[t]he parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison." *Id.*; *see also* 61 Pa. Cons. Stat. § 6111(a)-(b) (2010) (providing that the Board of Probation and Parole is "an independent administrative board for the administration of the probation and parole laws of this Commonwealth" consisting of nine members who are appointed by the Governor).

By contrast, "[t]he constitutional power of the Governor to grant pardons and commutations of sentence is exclusive . . . " *Commonwealth ex rel.*

Banks v. Cain, 345 Pa. 581, 585 (1942). As the Pennsylvania Supreme Court explained in *Commonwealth v. Zook,* 532 Pa. 79, 114 (1992):

> The Governor's power to commute sentences is found within Article IV, § 9 of the Pennsylvania Constitution. Under our Constitution of 1776, § 20, the Supreme Executive Council had the power to grant pardons and remit fines in all cases except in cases of impeachment. This doctrine has evolved over the years into the present day enactment, which provides in pertinent part: (a) In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. . . .

Id. (citing Pa. Const. art. IV, § 9) (citations omitted).[4] In *Banks,* the court discussed the differences between

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[4] All fifty states have incorporated clemency provisions in their respective constitutions. *See* Ala. Const. amend 38; Alaska Const. art. III, § 21; Ariz. Const art. V, § 5; Ark Const. art. VI, § 18; Cal. Const art. V, § 8; Colo. Const. art. IV, § 7; Conn Const. art. IV, § 13; Del. Const. art. VII, § 1; Fla. Const art. IV, § 8; Ga. Const. art. IV, § 2; Haw Const art. V, § 5; Idaho Const art. IV, § 7; Ill Const art V, § 12, Ind Const. art. V, § 17; Iowa Const. art. 4, § 16; Kan. Const. art. I, § 7; Ky. Const. § 77; La. Const. art IV, § 5(E); Me Const art. V, pt 1, § 11; Md Const. art II, § 20; Mass Const pt II, ch. 2, § 1, art 8; Mich. Const

(Continued on following page)

the concepts of parole and pardons and explained that:

> [t]here is a radical difference between a pardon and a parole. A pardon is the exercise of the sovereign's prerogative of mercy. It completely frees the offender from the control of the state. It not only exempts him from further punishment but relieves him from all the legal disabilities resulting from his conviction. It blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense. A parole, on the other hand, does not obliterate the crime or forgive the offender. It is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition, to be

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art. V, § 14; Minn Const. art. V, § 7; Miss Const. art. V, § 124, Mo. Const. art. IV, § 7; Mont. Const. art VI, § 12; Neb. Const. art IV, § 13; Nev Const. art V, § 13; N.H. Const pt. 2, art. 52, N J. Const. art. V, § 2; N M. Const art. V, § 6; N.Y Const art. IV, § 4; N.C. Const. art III, § 5(6); N D. Const. art. V, § 7; Ohio Const. art. III, § 11; Okla Const. art VI, § 10, Or. Const. art. V, § 14; Pa Const art. IV, § 9; R I. Const art IX, § 13; S C. Const. art. IV, § 14; S D Const. art. IV, § 3; Tenn Const. art. III, § 6, Tex Const. art IV, § 11; Utah Const art VII, § 12; Vt. Const ch. II, § 20; Va Const art. V, § 12, Wash Const. art. III, § 9; W. Va. Const art. VII, § 11; Wis. Const art V, § 6, Wyo Const art. IV, § 5.

> returned to the penal institution. Neither is a parole a commutation of sentence within the meaning of that term in the constitutional provision. When our present constitution was adopted, parole, as a penological expedient, was unknown to American jurists and legislators, and commutation was then generally understood as meaning a reduction in the length of the sentence, effecting a discharge of the prisoner without any further supervision over him by the state authorities.

Banks, 345 Pa. at 584-85 (citations omitted). *See also Commonwealth v. Sutley,* 474 Pa. 256, 273-74, 274 n.12 (1977) ("The power of commutation is an adjunct of the pardoning power, and can be granted only by the authority in which the pardoning power resides. . . . As defined by this Court, the pardon is: the exercise of the sovereign's prerogative of mercy. . . .") (citations and internal quotations omitted).

B

This action was originally brought as a petition for review in the Commonwealth Court of Pennsylvania on October 16, 1997, before the ballot question proposing the 1997 Amendment had been approved by voters. In the original action, the Pennsylvania Prison Society and others challenged the ballot question as violative of various provisions of the

United States and Pennsylvania Constitutions.[5] *See Pa. Prison Soc'y v. Commonwealth,* 727 A.2d 632, 635 (Pa. Commw. Ct. 1999), *rev'd,* 565 Pa. 526 (2001).

On November 12, 1997, after voters approved the 1997 Amendment, the Commonwealth removed the action to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1441(a). On January 5, 1998, Plaintiffs filed an amended complaint alleging that the 1997 Amendment violates various provisions of the United States Constitution. On January 15, 1998, the District Court granted the parties' joint motion to remand the state law claims and to stay the federal claims pending resolution of the state law claims.

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[5] Various representational organizations, including the Pennsylvania Prison Society, certain private individuals, and three individual prisoners filed this original action challenging the 1997 Amendment (collectively referred to as "Plaintiffs"). Sued in their official capacities were Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania; Edward Rendell, Governor of Pennsylvania; and Board of Pardons members Lieutenant Governor Joseph B. Scarnati, Attorney General Thomas W. Corbett, Jr., Louise Williams, Dr. Russell Walsh, and John Wetzel (collectively "the Commonwealth").

Following the District Court's judgment upon remand from this Court's decision in *Prison Soc'y I,* current Board of Pardons members Lieutenant Governor Joseph B. Scarnati, Attorney General Thomas W. Corbett, Jr., Louise Williams, Dr. Russell Walsh, and John Wetzel ("the Board of Pardons") appealed. Neither the Governor nor the Secretary of State is participating in these cross appeals. The only Plaintiffs who filed a cross-appeal were the Pennsylvania Prison Society, Douglas Hollis, Keith Smith, and Jackie Lee Thompson.

The Commonwealth Court determined that "the November 4, 1997 vote on the ballot question [was] null and void, as the single ballot question contained five amendments to the Pennsylvania Constitution." *Pa. Prison Soc'y v. Commonwealth,* 727 A.2d at 636. On July 25, 2001, the Supreme Court of Pennsylvania reversed the Commonwealth Court and upheld the 1997 Amendment as properly submitted. *Pa. Prison Soc'y v. Commonwealth,* 565 Pa. 526, 530, 537 (2001) (holding that "the voters should be given free opportunity to modify the fundamental law as may seem to them fit. . . .") (quoting *Taylor v. King,* 284 Pa. 235 (1925) (overruled in part by *Stander v. Kelley,* 433 Pa. 406 (1969)).

On July 29, 2002, after resolution of the state law claims, Plaintiffs filed a second amended complaint in the District Court presenting federal and state constitutional challenges to the 1997 Amendment, including a claim that for prisoners sentenced to life imprisonment prior to the effective date of the 1997 Amendment, the change in the voting requirements for the Board of Pardons violates the *Ex Post Facto* Clause as alleged in Count II. Plaintiffs' second amended complaint also alleges that the 1997 Amendment violates: the rights of life prisoners and prisoners under death sentence under the Due Process Clause (Count I); the Equal Protection Clause (Count III); Pennsylvania voters' rights under the Due Process Clause (Count IV); the Eighth Amendment (Counts V and VI); and the Guarantee Clause (Count VII). Plaintiffs also brought claims under the

Pennsylvania Constitution (Counts VII and VIII). In their second amended complaint, Plaintiffs requested declaratory and injunctive relief.

On August 12, 2002, the Commonwealth moved to dismiss Plaintiffs' second amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). On March 6, 2003, the District Court issued a memorandum in which it granted the Commonwealth's motion to dismiss Counts III through VIII pursuant to Rule 12(b)(6), and ordered the dismissal of the claim in Count I that due process rights of inmates with life sentences were violated. The District Court denied the Commonwealth's motion to dismiss the due process claims of inmates under death sentences as alleged in Count I, as well as the Commonwealth's motion to dismiss the prison inmates' claim under the *Ex Post Facto* Clause as alleged in Count II. (Mem. Op., March 6, 2003.)

In denying the motion to dismiss the *ex post facto* claim, the District Court relied upon Supreme Court cases analyzing the impact of changes in the eligibility requirements for *parole* release enacted by various states. It concluded that resolution of the *ex post facto* claim required a factual analysis, because "when an amendment 'does not by its own terms show a significant risk, the [prisoner] must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.'" (*Id.* at 11-12 (quoting *Garner v.*

Jones, 529 U.S. 244, 255 (2000) (considering whether an amendment to a Georgia rule that changed *parole* reconsideration review procedures violated the *Ex Post Facto* Clause)).)

Both sides moved for reconsideration of the District Court's March 6, 2003, order. The Plaintiffs argued that the District Court should reconsider its ruling on the *ex post facto* claim in light of *Smith v. Doe,* 538 U.S. 84 (2003), wherein the Supreme Court held that in determining whether legislation violates the *Ex Post Facto* Clause, a court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Id.* at 92 (quoting *Kansas v. Hendricks,* 521 U.S. 346, 361 (1997)). The District Court denied the Plaintiffs' motion for reconsideration. It held that

> [t]he present case is distinguishable from both *Doe* and *Hendricks* in that it involves a challenge to retroactive changes in state law governing prisoners' *parole,* instead of challenges to legislation regarding "sexual predators" or sexual offenders. The Supreme Court has consistently held that, in cases regarding retroactive changes in state law governing prisoners' *parole,* the relevant inquiry is whether the amendments create a significant risk of prolonging prisoners' sentences.

(Mem. Op., May 6, 2003, at 5-6 (emphasis added) (citing *Garner,* 529 U.S. at 251; *Lynce v. Mathis,* 519 U.S. 433, 441 (1997) (considering whether revisions

in Florida law impacting the award of early parole release credits to prison inmates violates the *Ex Post Facto* Clause); *Cal. Dep't of Corr. v. Morales,* 514 U.S. 499 (1995) (considering whether a law changing the procedures concerning the accessibility of parole suitability hearings violated the *Ex Post Facto* Clause); *Mickens-Thomas v. Vaughn,* 321 F.3d 374 (3d Cir. 2003) (considering whether material modifications of Pennsylvania parole laws violated the *Ex Post Facto* Clause).)

The Commonwealth moved the District Court to reconsider its partial denial of Plaintiffs' due process claim in Count I regarding prisoners sentenced to death, and urged it instead to dismiss the claim in its entirety. The Commonwealth argued that "[w]hether or not certain Board [of Pardons] members are biased against granting clemency does not render the amendment unconstitutional, although it may be grounds for disqualification in a particular case." (Defs.' Br. in Supp. of Mot. for Consideration, April 4, 2003, at 4-5.) The District Court agreed with the Commonwealth's argument in part. It held that

> [t]he prejudice of individual *Parole* Board members is irrelevant, as Plaintiffs must establish that the amendments would not be valid under any set of circumstances. . . . Plaintiffs may still pursue the argument that the inclusion of a crime victim on the Board

> impermissibly introduces decision-maker bias into the *parole* process.

(Mem. Op., May 6, 2003 at 7) (emphases added).[6]

On August 19, 2005, Plaintiffs filed a Motion for Summary Judgment. It was refiled on August 23, 2005 as an Amended Motion for Summary Judgment, pursuant to the District Court's instruction. Plaintiffs moved for summary judgment as to Count II on the ground that the 1997 Amendment "constitutes an improper *ex post facto* imposition of additional punishment in violation of the United States Constitution on persons who were sentenced to death or to life in prison prior to the effective date of such Amendment." (Pls.' Am. Mem. in Supp. of Their Mot. for Summ. J., Aug. 23, 2005.)

On September 13, 2005, the Commonwealth filed a Motion for Summary Judgment as to Plaintiffs' challenge to the inclusion of a crime victim on the Board of Pardons on the ground that it impermissibly introduced decision-maker bias into the clemency process in violation of the Due Process Clause. The Commonwealth also moved for summary judgment as to Plaintiffs' *ex post facto* claim, on the ground that Plaintiffs had "failed to show that the application of

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[6] Neither party addressed Rule 12(b)(1) in any of the papers filed in connection with the Commonwealth's motion to dismiss or in the parties' cross-motions for reconsideration. The District Court also did not discuss Rule 12(b)(1) in denying the Commonwealth's motion or in ruling on the parties' cross-motions for reconsideration

the Amendment will result in a longer period of incarceration for life-sentenced inmates [and they have not shown] that they themselves were individually disadvantaged by the Amendment." (Defs.' Br. in Supp. of Their Mot. Summ. J., at 23.)

On March 13, 2006, the District Court granted the Plaintiffs' Motion for Summary Judgment, holding that the new requirement of Board unanimity in recommending pardons for prisoners sentenced to life imprisonment who had committed their crimes before the 1997 Amendment's effective date violated the *Ex Post Facto* Clause. The District Court denied relief in all other respects. *Pa. Prison Soc'y v. Rendell,* 419 F. Supp. 2d 651, 662 (M.D. Pa. 2006).

The parties filed a timely appeal and cross-appeal to this Court. The Commonwealth argued that the District Court erred in failing to dismiss or, alternatively, to grant their motion for summary judgment on the *ex post facto* claim. *Prison Society I,* 508 F.3d at 160 n.6. The Commonwealth also argued, for the first time on appeal, that both the District Court and this Court lacked jurisdiction over Plaintiffs' claims because none of the Plaintiffs had standing under Article III of the U.S. Constitution. *Id.* at 169. This Court agreed that Plaintiffs' pleadings failed to allege facts demonstrating that they met the requirements for standing. *Id.* at 162-164 (organizational plaintiffs); 164 (voter/taxpayer plaintiffs); 164-169 (prisoner plaintiffs). This Court concluded that:

> Because the issue of standing was raised for the first time on appeal, none of the plaintiffs have had the opportunity to present evidence or to litigate this issue. We will therefore dismiss this appeal without prejudice for lack of jurisdiction and remand to the District Court for further proceedings consistent with this Opinion to develop the record in order to determine plaintiffs' standing to bring this action.

Id. at 169. Based upon the conclusion that the Plaintiffs lacked standing, this Court did not reach the Commonwealth's argument that the District Court erred in failing to dismiss this action or, alternatively, grant summary judgment to the Commonwealth on the *ex post facto* claim. The Commonwealth's appeal was dismissed and the case was remanded to the District Court so that the Plaintiffs could present evidence or otherwise litigate the standing issue.

On remand, the District Court held an evidentiary hearing regarding the standing issue as to each plaintiff on June 2, 2008, August 6, 2008, and August 7, 2008. The District Court determined that the Pennsylvania Prison Society was the only plaintiff that "satisfie[d] all of the requirements needed to qualify for the organizational exception to the prohibition on third party standing." *Pa. Prison Soc'y v. Cortés*, 2009 U.S. Dist. LEXIS 48995 *4 (M.D. Pa. June 11, 2009). The District Court also concluded that none of the remaining individual prisoner plaintiffs had standing "because they have not suffered or shown that they will imminently suffer an injury

resulting from the 1997 Amendments to the Pennsylvania Constitution."[7] *Id.* at *3. The District Court also denied a motion to intervene filed by prisoners Keith Smith and Jackie Lee Thompson, concluding that their "interests are adequately represented by . . . the Pennsylvania Prison Society." *Id.*

In its June 11, 2009 Memorandum Opinion, the District Court "reinstate[d]" its prior rulings on the Cross-motions for Summary Judgment filed by the parties in 2005 (Plaintiffs' motion filed August 23, 2005 and the Commonwealth's motion filed September 13, 2005). *Id.* at *49 (citing Mem. and Order, March 13, 2006, reported at *Pa. Prison Soc'y v. Rendell,* 419 F. Supp. 2d at 659, 661). In its March 13, 2006 Memorandum Opinion, the District Court concluded that the 1997 Amendment violates the *Ex Post Facto* Clause because retrospective application of the 1997 Amendment "clearly disadvantage[s] the applicants . . . [because its] change in voting requirements, from majority to unanimity, creates more than a speculative and attenuated risk of increasing the measure of punishment applied to life sentenced inmates." *Pa. Prison Soc'y,* 419 F. Supp. 2d at 661-62. The District Court considered evidence drawn from the new law's practical implementation, i.e., an analysis of the parties' stipulated rate and frequency of commutations granted to life-sentenced inmates in

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[7] Plaintiffs Roger Buehl, Douglas Hollis, and Vincent Johnson were the only individual prisoner plaintiffs remaining in the suit at the time of the District Court's ruling

Pennsylvania between 1970 and 2005. It concluded that, as applied to those inmates sentenced after its effective date, the 1997 Amendment posed a "significant risk" of increased punishment. *Id.* at 658, 660-61 n.1 & n.2. Based upon its finding that "the total number of recommendations by the Board for commutation for life sentenced prisoners [was] significantly lower than the number of recommendations in the eight years prior to the [1997 A]mendments' passage," the District Court held that

> even though a less than unanimous vote did not guarantee a life sentenced prisoner commutation prior to the passage of the 1997 amendments and although commutation is not completely foreclosed following the passage of the amendments, the 1997 amendments significantly reduced the likelihood of a life sentenced prisoner receiving a recommendation by the Board for commutation and, as such, the 1997 amendments make commutations and parole even more remote for those inmates.

Id. at 660-61.

The Board of Pardons and the Pennsylvania Prison Society, as well as Hollis, Smith, and Thompson filed timely cross-appeals from the District Court's final order of June 11, 2009.

The District Court asserted jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1441(a). This Court has jurisdiction over the appeal

from the District Court's final order pursuant to 28 U.S.C. § 1291.

Two dispositive issues remain in this protracted litigation. We must decide whether the District Court was required to conduct an evidentiary hearing to determine its subject matter jurisdiction over the *ex post facto* claim of each Plaintiff, pursuant to this Court's mandate in *Prison Soc'y I*. We must also address the question whether the 1997 Amendment, which concerns the exercise of a Governor's sovereign power of clemency as authorized by a state's voters, violates the *Ex Post Facto* Clause.

II

In *Prison Soc'y I*, this Court declined to reach the merits of the parties' cross-appeals from the District Court's order on the parties' Cross-Motions for Summary Judgment because the Second Amended Complaint did not demonstrate that any of the Plaintiffs had standing to assert their constitutional claims. For that reason, this Court dismissed the Commonwealth's appeal without prejudice, without reaching the merits of the cross-appeals and instructed the District Court to "develop the record in order to determine plaintiffs' standing to bring this action." *Prison Soc'y I*, 508 F.3d at 169.

A

The Board of Pardons argues that the District Court erred in permitting the Pennsylvania Prison Society to present evidence on the issue of its organizational standing because "[t]his Court's prior ruling in this case[, which] determined . . . that PPS, and all of the other organizational plaintiffs had failed to show standing," foreclosed further review of the issue by the District Court. (Appellants' Opening Br. 5.) Based upon the District Court's reading of this Court's opinion in *Prison Soc'y I,* it determined that the instruction upon remand was for it "to develop the record and determine standing for *all plaintiffs* in the current case, including the Pennsylvania Prison Society." *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *38-39 (emphasis added). The District Court based its conclusion upon the fact that this Court "did not specify certain individuals or classes of Plaintiffs" in its remand order who should be allowed to present evidence of their standing to present their claims to the District Court. *Id.* at *38. We are persuaded that the District Court did not err in complying with this Court's mandate that it determine the standing of each plaintiff before it could consider the merits of their constitutional claims.

B

The Board of Pardons also argues that the District Court erred in concluding that the Pennsylvania Prison Society had organizational standing to bring

this suit because its ruling was based upon the erroneous conclusion that individual members Keith Smith and Jackie Lee Thompson had standing to sue in their own right. The Board of Pardons argues that Smith and Thompson lacked standing because they "do not have live claims as their ability to challenge the 1997 amendments is time-barred." (Appellants' Reply Br. 8-9.) "We exercise plenary review of standing . . . issues, but review for clear error the factual elements underlying the District Court's determination of standing." *General Instrument Corp. v. Nu-Tek Elecs. & Mfg.*, 197 F.3d 83, 86 (3d Cir. 1999).

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When plaintiffs allege a future injury, that injury must be "certainly impending," not an injury that will only occur at "some indefinite future time." *Lujan*, 504 U.S. at 564 n.2. "'[S]ome day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases

require." *Id.* at 564. This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 221 (1974).

> [A]n association has standing to bring suit on behalf of its members when; (a) its members would otherwise have standing to sue in their own right; (b) the interests at stake are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Importantly, the organization must "make specific allegations establishing that at least one identified member ha[s] suffered or would suffer harm." *Summers v. Earth Island Inst.,* 129 S. Ct. 1142, 1151 (2009).

In *Prison Soc'y I,* this Court concluded that "the record [wa]s silent about the organizational plaintiffs' members and whether those members themselves meet the standing requirements to bring this case." *Prison Soc'y I,* 508 F.3d at 163. Upon remand, following months of discovery and three days of evidentiary hearings, the District Court found that "the evidence clearly shows that the Pennsylvania Prison Society satisfies all of the requirements needed to qualify for the organizational exception to the prohibition on third party standing and may pursue relief on behalf

of its members." *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *43.

Applying the test for organizational standing set forth in *Hunt,* the District Court found that the Pennsylvania Prison Society had presented evidence that Smith and Thompson were both members and had both received four-to-one (4-1) Board of Pardons votes in favor of their application for a commutation after the 1997 Amendment took effect. *Id.* at *40. Accordingly, it concluded that Thompson and Smith had standing to bring a constitutional challenge to the 1997 Amendment in his own right. *Id.*

The Board of Pardons' argument that Smith and Thompson lacked standing to bring this action because they failed to challenge the Board of Pardons' denial of their prior applications within the prescribed time frame for bringing such challenges is not persuasive. (Appellants' Opening Br. 27-28.) The Board of Pardons has cited no authority, and we have found none, holding that an *ex post facto* challenge to a constitutional amendment must be brought within a given time period or else it is forfeited. Moreover, the Pennsylvania Prison Society is not seeking damages for past injuries. It is seeking declaratory relief and an injunction. The Pennsylvania Prison Society has alleged that Smith and Thompson have suffered an "injury-in-fact" due to "imminent" future harm in connection with their current and future applications for commutations, which is sufficient for purposes of demonstrating standing to bring this action. Smith testified before the District Court that he filed an

application in 2007 that is currently "at a standstill because of the issue here. They said . . . that they [were] not moving any applications until . . . this situation is resolved." (J.A. 642.) Thompson testified that he is "working on" a new application for commutation that he intends to submit as soon as he clears up an administrative obstacle pertaining to his Social Security number. (Cross-Appellants' Br. 33.) The Board of Pardons has not demonstrated that Thompson and Smith are likely to receive less favorable votes from the Board of Pardons than the four-to-one votes they received the last time their applications were reviewed by the Board of Pardons. For purposes of establishing the District Court's subject matter jurisdiction to consider their complaint that their constitutional rights had been violated, Smith and Thompson's allegations were sufficient to withstand a dismissal of their claims pursuant to Rule 12(b)(1).

We agree with the District Court's conclusion that the Pennsylvania Prison Society satisfied the second prong of the *Hunt* test for organizational standing because it presented evidence that "the interests that the Pennsylvania Prison Society now seeks to assert are certainly germane to the Prison Society's purpose, *as stated in the Second Amended Complaint,* [which is] 'to advocate for a humane, just, and restorative correctional system, and to promote a rational approach to criminal justice issues.'" *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *43 (citing 2d Amend Compl. ¶ 5) (emphasis added). The constitutionality of the commutations

process is an interest that is "germane to the organization's purpose." *Hunt,* 432 U.S. at 343. The Prison Society has advocated for Pennsylvania's prisoner population since 1787. (2d Amend Compl. ¶ 5-9.) As the Second Amended Complaint explained, the Prison Society is concerned with promoting "a humane, just, and restorative correctional system" and "a rational approach to criminal justice issues." (*Id.*)

Finally, the District Court concluded that the Prison Society satisfied the third prong of the *Hunt* organizational standing test because "[n]either the claim asserted [n]or the relief requested [in the Second Amended Complaint] requires the participation of individual Prison Society members in the lawsuit since this suit alleges that the 1997 Amendments to the Pennsylvania Constitution impact several life-sentenced prisoners in Pennsylvania and violate the *Ex Post Facto* Clause of the United States Constitution." *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *93. The District Court correctly determined that the Pennsylvania Prison Society "satisfie[d] the so-called 'organizational exception' to the prohibition on third party standing and that the Prison Society's standing to bring this action on behalf of its members is appropriate regardless of Mr. Smith and Mr. Thompson's attempted intervention in this case." *Id.* at *42. As an organization, the Pennsylvania Prison Society is entitled to challenge the constitutionality of the 1997 Amendment and pursue related prospective relief on behalf of its members.

The District Court did not err in concluding that the Pennsylvania Prison Society had organizational standing to represent its members who are prisoners sentenced to life imprisonment. *See Hunt,* 432 U.S. at 343 (setting forth factors an association must show to demonstrate that it has standing to bring suit on behalf of its members).

C

Douglas Hollis argues in his cross-appeal that the District Court erred in concluding that he "lacked standing because he did not show a likelihood of receiving a majority vote in his pending petition for commutation, although he possesses the characteristics of lifers previously recommended for commutation, he previously received a majority vote, and he has a petition pending with the Board." (Appellees/ Cross-Appellants' Br. at 8.) Hollis asserts that the District Court's conclusion that he lacked standing to participate in this action is irreconcilable with its holding that Smith and Thompson had demonstrated standing to sue in their own right. *Id.* Hollis argues that because he, like Smith and Thompson, received a favorable four-to-one majority vote by the Board of Pardons in a past application for commutation, and he has a pending application for commutation, he has shown an injury-in-fact due to imminent future harm sufficient to sue in his own right. The Board of Pardons maintains that the District Court based its ruling on findings of fact that were supported by the evidence, and thus should not be disturbed by this

Court unless they are clearly erroneous. (Appellants' Reply Br. 18.)

The District Court concluded that Hollis had not demonstrated that he was "likely to receive a majority vote in favor of review on the application currently pending before the Board of Pardons." *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *30. This conclusion was based upon the District Court's finding that in Hollis's most recent application, filed in 1994, he received an unfavorable one-to-four vote against recommendation to the Governor. *Id.* at *24, 30. The District Court appears to have rejected Hollis's explanation that the reason he received a one-to-four vote was because his

> hearing was held immediately in the aftermath of the emotionally charged atmosphere of the November 1994 Gubernatorial election, wherein Lieutenant Governor Singel had lost to Governor Ridge, in part based upon Singel's recommendation to commute the life sentence of Reginald McFadden, who turned around and committed a murder and rape in New York less than a year after he got out.

Id. at *25. The Board of Pardons argues that, based upon the trend developed in the statistical evidence presented concerning the history of recommended commutations, Hollis would not have received a recommendation for commutation because the trend did not favor the exercise of clemency in Hollis' case. *Id.* at 27-31. The District Court concluded that "both

Mr. Hollis' personal commutation application history, along with the general commutations review 'trends' identified by the Defendants, show that the injury claimed by Mr. Hollis is, at this time, speculative." *Id.* at *30-31.

Hollis argues in his cross-appeal that the District Court's ruling, and this Court's earlier instruction that a plaintiff must show that he is "likely to receive a majority of votes favoring a commutation recommendation from the Board," *Pa. Prison Society I,* 508 F.3d at 165, is inconsistent with the Supreme Court's holdings in *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009), and *Adarand Constructors v. Pena,* 515 U.S. 200 (1995). (Cross-Appellants' Br. 75-78.) Hollis argues that these cases stand for the proposition that it is unnecessary to show the actual outcome of future conduct to establish standing, i.e., that the lifers here are not required to show that they would again receive a favorable four-to-one Board vote recommending commutation to have standing. (*Id.*) Rather, Hollis contends that "the lifers here must [only] demonstrate that they have definite plans to apply for commutation in the near future or have an application currently pending." (*Id.* at 78.)

The District Court held that Hollis had alleged only "a potential injury, happening on some indeterminate future date [that] is neither concrete nor particularized nor imminent, and [thus] does not satisfy the 'irreducible constitutional minimum' of standing established by Article III." *Pa. Prison Soc'y v. Cortés,* 2009 U.S. Dist. LEXIS 48995 at *30

(quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotations omitted). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). The Court explained in *Anderson*:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949)). We are persuaded that the District Court did not clearly err in finding that Hollis lacked individual standing to participate in this action. We

also note that Hollis is a member of the Pennsylvania Prison Society and that his interests are duly represented by the Prison Society, notwithstanding the District Court's ruling that he lacked individual standing.

D

Keith Smith and Jackie Lee Thompson cross-appeal from the District Court denial of their motion to intervene in this action. The District Court construed Smith and Thompson's motion to intervene as a motion for permissive intervention and denied it based upon the discretion provided to district courts pursuant to Fed. R. Civ. P. 24(b). *Pa. Prison Soc'y v. Cortés*, 2009 U.S. Dist. LEXIS 48995 at *45-48. Smith and Thompson argue that the District Court should have construed the motion as a request to intervene as of right based upon Fed. R. Civ. P. 24(a). We review a district court's ruling on a motion to intervene for abuse of discretion. *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998). This Court will reverse such a matter only if we conclude that the trial "court has abused its discretion by applying an improper legal standard or reaching a conclusion we are confident is incorrect." *Id.*

Rule 24(a) of the Federal Rules of Civil Procedure provides that, "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or

transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24(b) provides in relevant part that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Furthermore, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.*

The District Court concluded

> (1) that the interests of Mr. Smith and Mr. Thompson are adequately represented by the Pennsylvania Prison Society and (2) that their intervention into this case, after this Court's grant of summary judgment and the Court of Appeals' remand, would be purely superfluous and add unnecessary complexities that could potentially cause undue delay in the resolution of this case.

Pa. Prison Soc'y v. Cortés, 2009 U.S. Dist. LEXIS 48995 at *48. The District Court further found that there was no evidence that the Pennsylvania Prison Society had not been diligent in prosecuting this action on behalf of its members. *Id.* at *47. None of the arguments proffered by Smith and Thompson in

their cross-appeal demonstrates that their interests have not been adequately represented by the Pennsylvania Prison Society. The District Court did not abuse its discretion in denying Smith and Thompson's motion to intervene.

Accordingly, based upon its conclusion that the Pennsylvania Prison Society had standing to bring this action, the District Court properly "assume[d] jurisdiction to decide whether the allegations [in the second amended complaint] state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy" with respect to Plaintiffs' *ex post facto* claim. *Bell v. Hood,* 327 U.S. 678, 682 (1946).

III

The Board of Pardons argues in this appeal, as did the Commonwealth in *Prison Soc'y I,* that the District Court erred in granting summary judgment in favor of the Pennsylvania Prison Society because "the changes to Pennsylvania pardons procedures made by the 1997 constitutional amendments did not truly implicate the *Ex Post Facto* Clause." (Appellants' Br. 29.) It maintains that this Court should "reverse [the District Court's] rulings and . . . remand this case to the district court with directions either to dismiss this matter or to enter judgment in their favor, as may be appropriate given the resolution of the legal issues." (*Id.* at 4.) In urging this Court to remand this matter with directions that it be

dismissed, the Board of Pardons argues that "[t]he district court misapprehended critical characteristics of commutations/pardons in Pennsylvania, which compel the conclusion that the 1997 changes to voting procedures do not fit the definition of "*ex post facto.*" (*Id.* at 5.)

We are persuaded that the District Court erred as a matter of law in denying the Commonwealth's motion to dismiss Plaintiffs' *ex post facto* claim pursuant to Fed. R. Civ. P. 12(b)(6) because the Prison Society has not stated a viable *ex post facto* claim.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). In deciding a motion to dismiss, a court must determine whether the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 1950.

Plaintiffs allege in the Second Amended Complaint that "[t]he changes in the pardons process effectuated by the Amendment impose additional punishment on the Prisoner Plaintiffs since there is distinctly less of an opportunity to obtain a pardon or commutation." (2d Amend Compl. ¶ 44.) Plaintiffs also allege that "[p]rior to the Amendment, it was

distinctly more likely that the Prisoner Plaintiffs could obtain a pardon or commutation. However, since the Amendment became law, the Prisoner Plaintiffs are virtually shut out from that opportunity." (2d Amend Compl. ¶ 65.) These allegations fail to state a viable claim as a matter of law because the legal conclusion that the "Amendment impose[s] additional punishment" is not supported by any of the factual allegations in the Second Amended Complaint. The 1997 Amendment does not lengthen the sentences imposed upon the prisoners represented by the Pennsylvania Prison Society, who have been sentenced to serve a term of life imprisonment without parole.

"There is no *ex post facto* violation where the retroactively applied law does not make one's punishment more burdensome, but merely creates a disadvantage." *Spuck v. Ridge,* 347 F. App'x 727, 729 (3d Cir. 2009) (affirming the district court's dismissal of *ex post fact claim* where plaintiff's sentence was not lengthened or made more severe by the new guidelines which made furlough opportunities unavailable because that did not make the punishment more onerous) (citing *Hameen v. Delaware,* 212 F.3d 226, 236 (3d Cir. 2000)).

While the District Court correctly determined that the Pennsylvania Prison Society had standing to bring this action, in ruling on the Commonwealth's Rule 12(b)(6) motion to dismiss, it erroneously concluded that Plaintiffs had alleged facts sufficient to demonstrate that the 1997 Amendment could result in a longer period of incarceration for inmates

sentenced prior to its adoption. (Mem. Order Den. Defs.' Mot. to Dismiss, March 6, 2003, at 11-12.) For this same reason, we must also reverse the District Court's order granting summary judgment in favor of the Pennsylvania Prison Society.

As the Commonwealth has argued throughout this litigation, there are three distinct reasons why Plaintiffs' *ex post facto* claim is not viable.[8] First, the 1997 Amendment is not an *ex post facto* law "[g]iven the *ad hoc* nature of [executive] clemency, the retroactive application of the amendment cannot, as a matter of law, have any widespread effect on the period of incarceration for prisoners serving life sentences. . . ." (Defs.' Reply in Supp. of Their Mot. to Dismiss 9 (quoting *Solem v. Helm*, 463 U.S. 277, 300-301 (1983) (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981).)

Second, "[P]laintiffs *cannot* show that the passage of the Amendment has resulted or will result in a longer period of incarceration for life sentenced prisoners" because a life sentence, absent the executive grant of a commutation, is still a life sentence and nothing more. (Defs.' Mem. in Supp. of Their

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[8] In *Prison Soc'y I*, this Court did not reach the merits of the Commonwealth's contention that the District Court erred in denying its Rule 12(b)(6) motion, and in granting the Plaintiffs' motion for summary judgment for violation of the *Ex Post Facto* Clause, because the Plaintiffs failed to present any evidence of a significant injury to satisfy the jurisdictional requirement of demonstrating the existence of a case or controversy

Mot. for Summ. J. 20 (emphasis added); *see also* Appellants' Op. Br. 31 (citing *Commonwealth v. Szczesniewski*, 591 A.2d 1055, 1056 (Pa. Super. 1991) (holding that in Pennsylvania a term of life imprisonment is no less than and no more than natural life)); 61 P.S. § 331.21(a) (Parole is not a possibility for life- or death-sentenced prisoners).) The adoption of the 1997 Amendment did not increase the punishment. A term of life imprisonment is no less than and no more than natural life.

Third, the 1997 Amendment does not trigger an *ex post facto* inquiry because changes in the law that alter procedures for obtaining commutation, but do not eliminate the possibility of commutation, are procedural and thus not *ex post facto* laws. (Appellants' Br. 11, 29 (citing *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1253 (3d Cir. 1996)).)

We will first address the requirements for triggering an *ex post facto* inquiry when challenging a law that is violative of the *Ex Post Facto* Clause. We will then address the arguments concerning the deficiencies in Plaintiffs' *ex post facto* claim raised by the Commonwealth in its motion to dismiss, and before this Court in *Prison Soc'y I*, and by the Board of Pardons in the instant appeal.

A

The *Ex Post Facto* Clause of the Constitution, U.S. Const. art. I §§ 9 and 10, forbids the government from passing any law "which imposes a punishment

for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham,* 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (internal quotation omitted). The *Ex Post Facto* Clause is intended to provide fair warning about new punishments and to discourage arbitrary and oppressive legislation. *Weaver,* 450 U.S. at 28. To fall within the *ex post facto* prohibition, "two critical elements must be present . . . : it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29 (footnotes omitted).

In *Lindsey v. Washington,* the Supreme Court explained that, in reviewing a claim of an *ex post facto* violation, the focus is on the "effect" of the new law. *Lindsey,* 301 U.S. at 400. In *Lindsey,* at the time petitioners were convicted of grand larceny, that crime was punishable by a maximum sentence of "not more than fifteen years," and a minimum sentence to be fixed by the court in its discretion at some point between six months and five years, after which time petitioners were eligible for parole. *Id.* After petitioners committed their offense, but before they were sentenced, Washington enacted a new state law that made the maximum sentence provided by law *mandatory,* for those felonies carrying maximum sentences. *Id.* Petitioners challenged the new law in state court. The Supreme Court of Washington sustained the sentence. *Id.* at 399. The Supreme Court reversed. It held as follows:

> [T]he Supreme Court of Washington, without analysis or comparison of the practical operation of the [new and old] statutes, [upheld the law, declaring that] "[t]he amending act [did] not change or inflict a greater punishment than the law in force when the alleged crime was committed[,] for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remain the same as before the enactment of the act of 1935."

Id. at 399-400. The Court explained that "[t]he effect of the new statute is to make mandatory what was before only the maximum sentence." *Id.* at 400. The Court reasoned as follows:

> Removal of the possibility of a sentence of less than fifteen years . . . operates to [the] detriment [of petitioners] in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and

> control prior to the expiration of the fifteen-year term.

Id. at 401-02 (citation omitted).

In *Weaver,* the Supreme Court similarly held that a Florida law which, "[o]n its face, reduce[d] the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks," violated the *Ex Post Facto* Clause because "[b]y definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison." *Weaver,* 450 U.S. at 31. The Court noted that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 32 (citing *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974)). The Court explained its conclusion as follows:

> Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id. at 30-31. Citing *Lindsey*, the Court concluded that the petitioner in *Weaver* "[was] similarly

disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." *Id.* at 33-34.

Conversely, in *Dobbert v. Florida,* the Supreme Court reviewed a "new statute . . . [that] altered the methods employed in determining whether the death penalty was to be imposed," and concluded that there was no *ex post facto* violation because though the challenged provisions changed the role of jury and judge in sentencing, they did not add to the "quantum of punishment." *Dobbert v. Florida,* 432 U.S. 282, 293-94 (1977). "[E]ven if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Miller v. Florida,* 482 U.S. 423, 433 (1987) (quoting *Dobbert,* 432 U.S. at 293). "Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offen[s]e or the ultimate facts necessary to establish guilt.'" *Id.* (quoting *Hopt v. Utah,* 110 U.S. 574, 590 (1884)). "On the other hand, a change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" *Id.* (quoting *Weaver,* 450 U.S. at 29, n.12).

In *Cal. Dep't of Corr. v. Morales,* the Supreme Court considered whether a law changing the procedures concerning the accessibility of parole suitability hearings violated the *Ex Post Factor* Clause. *Cal. Dep't of Corr. v. Morales,* 514 U.S. 499 (1995). Morales

filed a federal habeas corpus petition asserting that an amendment to California's parole procedures that allowed the California Board of Prison Terms to decrease the frequency of parole suitability hearings under certain circumstances constituted an *ex post facto* law barred by the United States Constitution.[9] The district court denied the petition. The Ninth Circuit Court of Appeals reversed, however, holding that the retrospective law made a parole hearing less accessible to respondent and thus effectively increased his sentence in violation of the *Ex Post Facto* Clause. The California Department of Corrections filed a petition for *certiorari* before the Supreme Court, and it was granted.

Morales argued before the Court that the new law increased the punishment attached to his crime because, under *Lindsey, Miller,* and *Weaver,* "a legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been

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[9] Morales was convicted of murdering his wife while he was out on parole for having committed a prior murder. Under the law in place at the time he committed his second murder, Morales would have been entitled to parole suitability hearings on an annual basis *Morales,* 514 U S. at 503 (citation omitted) After his second murder conviction, the California Legislature authorized the California Board of Prison Terms to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of " 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.' " *Id.* (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

committed." *Morales*, 514 U.S. at 505 (citations omitted). The Supreme Court disagreed. It held that the new law did not violate the *Ex Post Facto* Clause because

> *the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' nor . . . on whether an amendment affects a prisoner's 'opportunity to take advantage of provisions for early release,' but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.*

Id. at 499, 506 n.3 (citation omitted) (emphasis added). The Court distinguished *Lindsey*, *Miller*, and *Weaver*, explaining that:

> Both before and after the [new law], California punished the offense of second-degree murder with an indeterminate sentence of "confinement in the state prison for a term of 15 years to life." The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range. Thus, although 15 years was the formal "minimum" term of confinement, respondent was able to secure a one-third "credit" or reduction in this minimum by complying with prison rules and regulations. The amendment had no effect on the standards for fixing a prisoner's initial date of "eligibility" for parole, or for determining his "suitability" for parole and setting his release date.

Id. at 507 (citations omitted). The Court also rejected Morales's argument that "the *Ex Post Facto* Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment . . . [where] there is 'no principled way to determine how significant a risk of enhanced confinement is to be tolerated.'" *Id.* at 508 (quoting Brief for Respondent 39). In rejecting Morales's expansive view of the *Ex Post Facto* Clause, the Court explained that adopting this contention

> would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement [. . . and charge the judiciary . . .] with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures, including such innocuous adjustments as changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Id. at 508-09. The Court stated that while "[t]hese and countless other changes might create some speculative, attenuated risk of affecting a prisoner's

actual term of confinement by making it more difficult for him to make a persuasive case for early release, . . . that fact alone cannot end the matter for *ex post facto* purposes." *Id.* at 508-09.

In *Garner v. Jones,* 529 U.S. 244 (2000), the Supreme Court considered whether an amendment to a Georgia rule that changed parole reconsideration review procedures violated the *Ex Post Facto* Clause. *Id.* at 246. Jones was convicted of murder and sentenced in 1974 to a term of life in prison. *Id.* at 247. Having escaped and committed a second murder, Jones was again convicted and sentenced to life in prison in 1982. *Id.* Under Georgia law in effect at the time of Jones's second offense, the state's Board of Pardons and Paroles was required to consider inmates serving life sentences for parole after seven years, and if not granted, every three years thereafter. *Id.* (citing Ga. Code Ann. § 42-9-45(b) (1982)). "After Jones was incarcerated but before he was initially considered for parole, the Board [of Pardons] amended its rules to require that parole reconsideration take place only once every eight years." *Jones v. Garner,* 164 F.3d 589, 590 (11th Cir. 1999) (citing Ga. Comp. R. & Regs. r. 475-3-.05.(2) n.1).

Jones brought an action under 42 U.S.C. § 1983, claiming, *inter alia,* that the amendment to Rule 475-3-.05(2) violated the *Ex Post Facto* Clause. *Id.* The suit was filed against individual members of the Parole Board. The district court granted summary judgment in favor of the Parole Board on the ground that the amendment to Rule 475-3-.05(2) "change[d]

only the timing between reconsideration hearings for inmates sentenced to life in prison, thereby relieving the Board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released." *Garner,* 529 U.S. at 248 (quotation omitted). The Eleventh Circuit reversed, holding that retroactive application of the amended Georgia Rule differed in material respects from the California law sustained in *Morales* because it "seems certain" to result in some prisoners serving extended periods of incarceration. *Jones,* 164 F.3d at 589; *Garner,* 529 U.S. at 248-49. As such, the Eleventh Circuit held that the amended Georgia Rule violated the *Ex Post Facto* Clause. *Jones,* 164 F.3d at 595.

The Supreme Court reversed, explaining that "the standard announced in *Morales* requires a more rigorous analysis of the level of risk created by the change in law." *Garner,* 529 U.S. at 255.

> When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

Id. Because Jones had not shown "that as applied to his own sentence the law created a significant risk of increasing his punishment," the Supreme Court remanded the case to the district court to determine "whether retroactive application of the amendment to

Rule 475-3-.05(2) increases, to a significant degree, the likelihood or probability of prolonging [Jones's] incarceration." *Id.* at 255-56.

It is thus clear from the Supreme Court cases that have reviewed legislative changes affecting *parole* decisions that, to demonstrate an *ex post facto* claim, a plaintiff must show that the effect of a retroactive change in the law or policy created a "significant risk" that the sentence ultimately served will be increased above and beyond what was prescribed when the crime was consummated, as a result of the new law. Allegations that changes in the law have produced "some ambiguous sort of 'disadvantage,' [or] . . . affect[ed] a prisoner's '*opportunity* to take advantage of provisions for early release,'" are not sufficient grounds for bringing an *ex post facto* claim. *Morales,* 514 U.S. at 506 n.3 (citations omitted). With these parameters in mind, we will address the Board of Pardons' arguments concerning the viability of Pennsylvania Prison Society's *ex post facto* claim.

1

In granting the Plaintiffs' Motion for Summary Judgment on the *ex post facto* claim, in its March 13, 2006 memorandum opinion, the District Court reasoned as follows:

> [T]he 1997 amendment[']s change in voting requirements, from majority to unanimity, creates more than a speculative and attenuated risk of increasing the measure of

> punishment applied to life sentenced inmates. Further, the requirement of convincing all, rather than a majority, of the Board members that commutation is warranted is a more difficult task for any applicant, and will equally disadvantage every applicant to which the amendment is applied. As such, Plaintiffs have offered evidence sufficient to demonstrate individual disadvantage as required by the Third Circuit in *Richardson*.

Pa. Prison Soc'y v. Rendell, 419 F. Supp. 2d at 662 (citation omitted).

The Board of Pardons argued in its motion to dismiss, and throughout this litigation, that Plaintiffs have failed to state an *ex post facto* claim because, "in Pennsylvania, clemency is a process separate and apart from criminal case due process and involves a matter of executive – not judicial – grace." (Appellant's Op. Br. 17.) The Board of Pardons asserts that "[c]ommutation . . . is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards." (Defs.' Reply in Supp. of Their Mot. to Dismiss 9 (quoting *Solem*, 463 U.S. at 300-01 citing *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981))).)

The 1997 Amendment concerns a change in procedures required for seeking commutation from the Governor. "Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever,

appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464.

In *Snodgrass v. Robinson*, 512 F.3d 999 (8th Cir. 2008), the Eighth Circuit affirmed a district court's dismissal of an *ex post facto* claim pursuant to Rule 12(b)(6). *Id.* at 1000-01. Snodgrass challenged an Iowa law that altered commutation procedures by changing the frequency with which a life sentenced prisoner could apply to the Governor for commutation. In addressing the plaintiff's challenge, the Eighth Circuit explained that

> the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor . . . on whether an amendment affects a prisoner's "opportunity to take advantage of provisions for early release," but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. Simply put, not every change in the law raises ex post facto concerns. The changed law must create a "significant risk" of increasing the offender's punishment.
>
> Here, Snodgrass's claim does not hinge on the availability of parole, but on the availability of a commutation – the only means by which she might become eligible for parole. Whereas changes to parole procedures may, in some circumstances raise *ex post facto* concerns, changes to Iowa's procedures for commutation applications do not. This is

> because most parole procedures are distinct from the highly personal, policy oriented, and legislatively unchecked authority of the Iowa governor to grant sentence commutations.
>
> The unpredictability of a wholly discretionary grant of commutation in Iowa precludes Snodgrass from demonstrating that the changes in Iowa's law raise a "significant risk" that she will be denied a commutation she otherwise would have received. As such, she cannot demonstrate there is a significant risk her punishment will be longer than it would have been under former Iowa Code Section 902.2. Accordingly, she cannot make out an *ex post facto* claim.

Id. at 1002-03 (citations and footnote omitted); *see also Smith v. Sampson,* 2009 U.S. Dist. LEXIS 84657 (E.D. Mich. Sept. 17, 2009) (granting defendants' motion to dismiss plaintiff's *ex post facto* claim challenging a change in commutation procedures in Michigan that are similar to those in Pennsylvania).

In *Smith,* the plaintiff's "claim [was] that the commutative effect of changes in [Michigan] state law have impaired his opportunity for commutation in violation of the *Ex Post Facto* Clause of the United States Constitution." *Smith,* 2009 U.S. Dist. LEXIS 84657 at *3. In opposing the defendants' motion to dismiss, Smith argued that, under *Garner,* he was entitled to show, "by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, . . . its retroactive application

will result in a longer period of incarceration than under the earlier rule" because "the requisite risk was not inherent in the framework of an amended rule." *Id.* at *4 (citing *Garner,* 529 U.S. at 255). The district court held that "*Garner* [is] distinguishable given the differences in the discretionary authority of the parole board and the governor." *Id.* Citing *Snodgrass,* the district court granted the defendants' motion to dismiss based upon its determination that Smith "cannot show that the change [in the law] creates a 'significant risk' that he will be denied a commutation" because "the impact of any change in the law . . . will never be more than speculative relative to the governor's exercise of her right to commute sentences. *Id.* at *8 (citing *Snodgrass,* 512 F.3d at 1002 n.2).

It is well settled that, "[a]s a matter of law, parole and commutation are different concepts, despite some surface similarities." *Solem,* 463 U.S. at 300. In *Solem,* the Supreme Court explained:

> Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. *See, e.g., Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1 [99 S.Ct. 2100, 60 L.Ed.2d 668] (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer,* 408 U.S. 471, 477 (1972) ("the practice of releasing prisoners on parole

> before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted.

Id. at 300-01.

The Constitutions of the United States and of the Commonwealth of Pennsylvania entrust clemency decisions to the sole discretion of the executive branch. *See* U.S. Const. art. II, § 2, cl. 1 (the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States . . . "); Pa. Const. art. IV, § 9(a) ("In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons . . . ").

The genesis of the doctrine of the sovereign power to grant clemency in the United States is found in the English common law. "In England, the clemency power was vested in the Crown and can be traced back to the 700's." *Herrera v. Collins,* 506 U.S. 390, 412 (1993). As the Supreme Court explained in *Schick v. Reed,* 419 U.S. 256 (1974):

> At the time of the drafting and adoption of our Constitution it was considered elementary that . . . the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit.

Id. at 261 (quotation marks and citation omitted). Historically, the exercise of clemency authority has

been considered "a matter of grace." *See, e.g., Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272, 282 (1998) (a petition for commutation is a "unilateral hope"; clemency is "a matter of grace"); *United States v. Wilson,* 32 U.S. 150, 160 (1833) ("A pardon is an act of grace").

In *Wilson,* drawing on England's historical and judicial experience, Chief Justice John Marshall explained the origin of the executive pardon:

> The constitution gives to the president, in general terms, "the power to grant reprieves and pardons for offences against the United States."
>
> As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance[,] we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.
>
> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that

> the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

Wilson, 32 U.S. at 160-61.

In *Ex parte Wells,* 59 U.S. 307 (1856), the Court again addressed the origin and exercise of executive clemency:

> At the time of our separation from Great Britain, [the pardon] power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by

> the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

Id. at 311.

In *Herrera,* the Court reaffirmed the traditional conception of clemency as a function of the executive branch, separate from adjudicatory proceedings within the Judicial Branch. *Herrera,* 506 U.S. at 411-13. The Court noted that one of the great advantages of monarchy is "that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." *Id.* at 412 (quoting 4 William Blackstone, Commentaries on the Laws of England *397). In *Dumschat,* the Court instructed that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Dumschat,* 452 U.S. at 464; *see also Ohio Adult Parole Auth.,* 523 U.S. at 289 ("[I]t is true that 'pardon and commutation decisions have not traditionally been the business of courts . . . '") (quoting *Dumschat,* 452 U.S. at 464)).

The Pennsylvania courts have held that the judiciary

> can[not] impinge upon the exclusive jurisdiction of the executive branch of the government in [determining whether to commute a sentence]. Action by the Board of Pardons is in accordance with constitutional provisions and in no way comes under the aegis of the courts. Indeed, were a court to review the conduct of a hearing before the Board of Pardons it would be a clear invasion by judicial direction of the immunity granted the executive branch of our government. Such is not consonant with our constitutional doctrine of separation of powers.

Commonwealth ex rel. Cater v. Myers, 412 Pa. 67, 71 (1963) (quoting *Mississippi v. Johnson,* 4 Wall. 475 (1866), which held that "[t]he Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department"), *cert. denied,* 376 U.S. 933 (1964); *see also Commonwealth v. Gaito,* 419 A.2d 1208, 1212 (Pa. Super. Ct. 1980) ("The Governor's power to commute sentences, on recommendation of the Board of Pardons, is exclusive, and courts may not in any way impinge on the exercise of this power.").

The Supreme Court has instructed that there are four exceptions to the sovereign's executive clemency powers. First, a pardon cannot interfere with the vested property rights of third parties in violation of

the Takings Clause. *See* U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation."); *see also Knote v. United States,* 95 U.S. 149, 154 (1877) ("Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force."); *Ex parte Garland,* 71 U.S. 333, 381 (1866) ("There is only this limitation to [the pardon power's] operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."). Second, in *Hart v. United States,* 118 U.S. 62 (1886), the Court instructed that a pardon cannot require the payment of funds from the Treasury in violation of the Spending Clause. *Id.* at 67; *see also Knote,* 95 U.S. at 154 ("The power of the pardon . . . cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power."). Third, a pardon cannot require a prisoner to forfeit his constitutional rights unreasonably. *See Schick,* 419 U.S. at 266 (noting that the pardon power "permits the attachment of any conditions which does not otherwise offend the Constitution").

The Supreme Court has also instructed that the procedures by which a pardon is granted must comply with the Due Process Clause of the Fifth Amendment. *Ohio Adult Parole Auth.,* 523 U.S. at 276. "The Due Process Clause is not violated, [however], where . . .

the procedures in question do no more than confirm that the clemency and pardon power is committed, as is our tradition, to the authority of the executive." *Id.* Justice O'Connor explained in her concurrence in Ohio *Adult Parole Auth.*:

> [A]lthough it is true that "pardon and commutation decisions have not traditionally been the business of courts," *Dumschat, supra,* at 464, and that the decision whether to grant clemency is entrusted to the Governor under [state] law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.

Id. at 289 (O'Connor, J. concurring).[10]

Beyond these judicially imposed limitations on the executive clemency power, the remaining checks on the sovereign power of the President or of

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[10] The Pennsylvania Prison Society has not appealed from the District Court's denial of the Plaintiffs' due process claim in this cross-appeal.

a Governor are left to the legislative branch and to the powers vested in the people.[11]

Here, the voters of the Commonwealth of Pennsylvania expressly voted to limit the Governor's clemency power, as they are empowered to do under Article XI of the Pennsylvania Constitution. Pa. Const. art. XI. By mandating that all recommendations for a commutation considered by the Governor must first be approved by a unanimous vote of the Board of Pardons, the 1997 Amendment restricted, but did not absolutely foreclose, the exercise of the Governor's sovereign power to grant a commutation to inmates sentenced to life imprisonment. The power to grant or deny commutations, as prescribed by the Commonwealth's voters, rests solely with the executive branch which may "deny the requested relief for any constitutionally permissible reason or for no

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[11] For example, Congress can check misuse of the pardon power by impeaching the President. *See e.g.*, U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives . . shall have the sole Power of Impeachment."); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *id.* art. II, § 4 ("The President . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."); *Ex parte Grossman*, 267 U.S. 87, 121 (1925) (noting that the President could be impeached if he pardoned too many criminal contempts). The voters also have the ability to check the executive clemency power by choosing not to re-elect a President or Governor whom they believe may be inappropriately using the pardon power. *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("Ultimately, there is the political check that the people will replace those in the political branches . . who are guilty of abuse.").

reason at all." *See Dumschat,* 452 U.S. at 467 (Brennan, J. concurring) (stating that an inmate sentenced to life imprisonment for murder has "no protectible liberty interest in a pardon" (citing *Meachum,* 427 U.S. at 228)). Accordingly, the Pennsylvania Prison Society has not demonstrated that it has a viable claim that the 1997 Amendment raises a "significant risk" that commutations will be denied that otherwise would have been received. *Snodgrass,* 512 F.3d at 1002.

2

The Board of Pardons also argues that the 1997 Amendment does not violate the *Ex Post Facto* Clause because it does not "increase[ ] the penalty" by which a crime is punishable of inmates who are sentenced to life without the possibility of parole. (Appellants' Reply Br. 10.) *See Morales,* 514 U.S. at 505. The District Court held that the retrospective application of the 1997 Amendment violates the *Ex Post Facto* Clause because the "change in voting requirements, from majority to unanimity, creates more than a speculative and attenuated risk of increasing the measure of punishment applied to life sentenced inmates" and "disadvantage the applicants." *Pa. Prison Soc'y v. Rendell,* 419 F. Supp. 2d at 661.

Citing the standard set forth in *Garner,* the District Court considered "evidence drawn from the [new law's] practical implementation," i.e., an analysis of the parties' stipulated rate and frequency of

commutations granted to life-sentenced inmates in Pennsylvania between 1970 and 2005, and concluded that as applied to those inmates sentenced after its effective date, the 1997 Amendment posed a "significant risk" of increased punishment. *Pa. Prison Soc'y v. Rendell,* 419 F. Supp. 2d at 660-61 n.1 & n.2. Based upon its finding that "the total number of recommendations by the [Pardons] Board for commutation for life sentenced prisoners [was] significantly lower than the number of recommendations in the eight years prior to the [1997 A]mendments' passage," the District Court concluded:

> [E]ven though a less than unanimous vote did not guarantee a life sentenced prisoner commutation prior to the passage of the 1997 amendments and although commutation is not completely foreclosed following the passage of the amendments, the 1997 amendments significantly reduced the likelihood of a life sentenced prisoner receiving a recommendation by the Board for commutation and, as such, the 1997 amendments make commutations and parole even more remote for those inmates.

Id. at 660-61.

In granting the Prison Society's Motion for Summary Judgment, the District Court based its decision on the following passage from *Mickens-Thomas v. Vaughn*:

> [A]n offender, prior to his conviction and sentencing, is entitled to know not only his

> maximum possible punishment, but also his or her chances of receiving early release, since this too is a relevant factor in the plea bargaining calculus. An adverse change in one's prospects for release disadvantages a prisoner just as surely as an upward change in the minimum duration of sentence.

Pa. Prison Soc'y v. Rendell, 419 F. Supp. 2d at 659 (quoting *Mickens-Thomas*, 321 F.3d at 392).

Mickens-Thomas involved an *ex post facto* challenge to a "material modification of [Pennsylvania] *parole* laws." *Mickens-Thomas*, 321 F.3d at 376 (emphasis added). Mickens-Thomas was convicted of rape and murder in 1964. *Id.* He was sentenced to life in prison. The Governor of Pennsylvania commuted Mickens-Thomas's life sentence. *Id.* at 377. In December 1996, the Pennsylvania legislature changed the law concerning the decision-making policies of the Pennsylvania Board of Probation and Parole to require that the "primary consideration" in determining whether a prisoner was eligible for release on parole was "the risk to public safety by the parole petitioner as the dominant factor in evaluating parole applications." *Id.* "The 1941-1996 statute, in effect at the time of Thomas's conviction, made no specific mention of public safety." *Id.* Mickens-Thomas was denied *parole* over the course of the following three years for various reasons, including that his past crime was a sex offense and that he was "in a 'deniers' group – those who deny responsibility for the underlying offense." *Id.* at 381 (emphasis added).

In December 1999, Mickens-Thomas filed a petition for a writ of habeas corpus in the United States District Court "alleg[ing] that the Board denied his parole in violation of the *Ex Post Facto* clause, by applying retroactively the revised December 1996 parole statute." *Id.* at 383.

The district court in *Mickens-Thomas* held that the Pennsylvania Board of Probation and Parole "retroactively applied this [statutory] policy change adversely to the *parole* applications of Louis Mickens-Thomas . . . in violation of the *Ex Post Facto* clause." *Id.* at 376 (emphasis added). This Court affirmed, holding that "to retroactively apply changes in the *parole* laws[,] made after conviction for a life sentence in Pennsylvania that adversely affect the release of prisoners whose sentences have been commuted, violates the *Ex Post Facto* clause." *Id.* at 393 (emphasis added). This Court also concluded that:

> Pre-1996, a prisoner could be denied parole because of public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Id. at 385.

The issue presented in *Mickens-Thomas* is similar to the arguments raised by the petitioners in *Weaver*, *Morales*, and *Garner* in challenging the

denial of release on parole. In each of these cases, prisoners seeking release on parole challenged a statutory change in parole release laws. Mickens-Thomas was sentenced to life without the possibility of parole. He challenged the retrospective application of Pennsylvania's *parole* laws, not the procedures employed by the Board of Pardons for prisoners seeking a commutation.

In support of its decision on this matter, the District Court relied on this Court's statement in *Mickens-Thomas* that "'eligibility for a commutation of a life sentence entails the possibility of parole[,]' and although commutations 'are quite rare,' application of the new parole policies rendered Thomas' prospects for parole 'even more remote' in violation of the *Ex Post Facto* Clause." *Pa. Prison Soc'y v. Rendell*, 419 F. Supp. 2d at 659 (quoting *Mickens-Thomas*, 321 F.3d at 392). Based upon this comment, the District Court concluded that the retroactive application of the 1997 Amendment to the Governor's sovereign clemency powers created a "significant risk" of increased punishment for life-sentenced prisoners. *Id.* We disagree. *Mickens-Thomas* is not dispositive on the question whether the 1997 Amendment, which concerned the executive clemency power, impaired a prisoner's rights under the *Ex Post Facto* Clause. *Mickens-Thomas* solely concerns a prisoner's right to *parole*. It does not address the viability of a claim challenging the scope of a Governor's clemency power to grant commutation.

Furthermore, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). "The unpredictability of a wholly discretionary grant of commutation . . . precludes [plaintiffs] from demonstrating that the changes in . . . [the] law raise a 'significant risk' that [plaintiffs] will be denied a commutation [they] otherwise would have received." *Snodgrass*, 512 F.3d at 1002. "As such, [Plaintiffs] cannot demonstrate there is a significant risk [their] punishment will be longer than it would have been under former [law]." *Id.*

There is no *ex post facto* violation where a retroactively applied law does not make one's punishment more burdensome, but merely creates a disadvantage. *See Hameen v. Delaware*, 212 F.3d 226, 238 n.2 (3d Cir. 2000) (explaining that a law is not *ex post facto* merely because it worked to the detriment or substantial disadvantage of the defendants) (quotations and citations omitted). The Pennsylvania Prison Society is representing the interests of prisoners who are serving a maximum sentence of life without the possibility of parole. *See Mickens-Thomas*, 321 F.3d at 377 ("Life sentences in Pennsylvania presumptively exclude any possibility of parole."). "[I]n Pennsylvania, . . . the legal sentence is the maximum sentence." *Commonwealth v. Sutley*, 474 Pa. 256, 268 (1977) (citations omitted); *see also Commonwealth v. Daniel*, 430 Pa. 642 (1968) ("Under Pennsylvania law . . . the maximum sentence is the only portion of the

sentence which has legal validity. . . ."). The 1997 Amendment, therefore, does not "increase[ ] the penalty by which [any of Plaintiffs'] crime[s] [were] punishable," because all of the crimes for which the prisoners represented by the Pennsylvania Prison Society were convicted were punishable by life in prison without the possibility of parole at the time they were convicted and validly sentenced. *Morales*, 514 U.S. at 506.

We disagree with the District Court's conclusion that the retrospective application of the 1997 Amendment to the Governor's clemency power "creates more than a speculative and attenuated risk of *increasing* the measure of punishment applied to life sentenced inmates." *Pa. Prison Soc'y v. Rendell*, 419 F.Supp.2d at 661 (emphasis added).

3

Finally, the Board of Pardons argues that "the [District C]ourt should have determined that, on its face, that [the Second Amended Complaint] presented no viable *ex post facto* claim arising from the 1997 constitutional amendment changing the voting procedures of the Board of Pardons." (Appellants' Op. Br. 28-29.) "Changes in procedures that might make it more difficult to obtain . . . clemency do not carry with them *ex post facto* consequences." (Appellants' Reply Br. 16.)

"Although the prohibitions against *ex post facto* laws cannot be evaded just by calling a change in law

procedural, only the 'alteration of a substantial right' is forbidden." *United States v. Molt,* 758 F.2d 1198, 1200 (7th Cir. 1985) (quoting *Weaver,* 450 U.S. at 29 n.12, and holding that a "change in the standard for bail pending appeal is not an *ex post facto* law"); *see also McKenzie v. Day,* 57 F.3d 1461, 1469 (9th Cir. 1995) (McKenzie's claim that the state violated his rights under the *ex post facto* clause by changing the place and procedures applicable to his execution is precluded by *Holden v. Minnesota,* 137 U.S. 483 (1890), which stands for the proposition that such matters are "regulations that do not affect [the prisoner's] substantial rights.").

In *Molt,* the Seventh Circuit explained that

> the presumption is against construing a procedural change as an *ex post facto* law, and [that] must carry the day in the absence of a stronger showing than made in this case that the change works an increase in punishment. For though we have been speaking of the Bail Reform Act as if it had abolished the right to bail pending appeal, it did no such thing; it merely made it harder to get bail pending appeal . . . The change in the balance of advantages against the defendant is too slight to bring the change within the scope of the *ex post facto* clause.

Molt, 758 F.2d at 1200.

We agree with the Board of Pardons that the 1997 Amendment presents no viable *ex post facto* claim because it only concerns a change in the voting

procedures employed by the Board of Pardons, a change that does not affect the prisoners' substantial rights and thus one that is "too slight" to bring it within the scope of the *Ex Post Facto* Clause. *Molt,* 758 F.2d at 1200.

B

We are persuaded that the District Court erred as a matter of law when it failed to grant the Commonwealth's Motion to Dismiss Plaintiffs' *ex post facto* claim pursuant to Rule 12(b)(6). For the same reasons, the District Court also erred in granting summary judgment in favor of the Pennsylvania Prison Society.

"Generally, a denial of a motion to dismiss does not conclusively determine anything because it merely decides that questions of fact remain to be decided." *Pan Eastern Exploration Co. v. Hufo Oils,* 798 F.2d 837, 839 (5th Cir. 1986) (citing *Coleman by Lee v. Stanziani,* 735 F.2d 118, 120 (3d Cir. 1984)). "If, [however,] on appeal from a final judgment, an appellate court finds that the motion to dismiss should have been granted, it can direct the lower court to dismiss." *Id.* at 840; *see also Stinson v. Kaiser Gypsum Co.,* 972 F.2d 59, 63 (3d Cir. 1992) (reversing where "the district court should have granted Kaiser's motion to dismiss based on Pennsylvania's two-year statute of limitations" and remanding "so that it may do so"); *Liotta v. Nat'l Forge Co.,* 629 F.2d 903, 908 (3d Cir. 1980) (reversing district

court's grant of summary judgment where a motion to dismiss should have been granted and the case remanded for further proceedings); *Gardner v. The Calvert,* 253 F.2d 395, 398 (3d Cir. 1958) (same).

IV

The Pennsylvania Prison Society argues in their cross-appeal that the District Court erred because "[i]t did not enter a declaratory judgment; it did not enter an injunction; it did not even specify to whom, if anyone, its judgment applies. (Appellees'/Cross-Appellants' Br. 48-49.) Based upon our conclusion that the Commonwealth's Motion to Dismiss Plaintiffs' *ex post facto* claim pursuant to Rule 12(b)(6) should have been granted because Plaintiffs have failed to state a viable *ex post facto* claim, we will affirm the District Court's denial of the Pennsylvania Prison Society's request for a declaratory judgment and injunctive relief. *See Bircoll v. Miami-Dade County,* 480 F.3d 1072, 1088 n.21 (11th Cir. 2007) (this Court may affirm on any ground supported by the record).

CONCLUSION

For the foregoing reasons, we reverse the District Court's grant of summary judgment in favor of the Pennsylvania Prison Society and remand this matter with instructions that the District Court shall enter an order dismissing this action.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-3017

PA PRISON SOCIETY; JULIA D. HALL; GREGORY H. KNIGHT; FIGHT FOR LIFERS INC; WILLIAM GOLDSBY; JOAN PORTER; GRATERFRIENDS INC.; JOAN F. GAUKER; VINCENT JOHNSON; FRIENDS COMMITTEE TO ABOLISH THE DEATH PENALTY INC.; KURT ROSENBERG; PENNSYLVANIA ABOLITIONISTS UNITED AGAINST THE DEATH PENALTY; TERRY RUMSEY; ROGER BUEHL; DOUGLAS HOLLIS; DIANNA HOLLIS

v.

PEDRO A. CORTES, Secretary, Commonwealth of Pennsylvania; HONORABLE EDWARD G. RENDELL; JOSEPH B. SCARNATI, LT GOVERNOR; THOMAS W. CORBETT, JR.; LOUISE B. WILLIAMS; RUSSELL A. WALSH, PhD.; JOHN E. WETZEL

(Pursuant to Fed. R. App. P. 43)

Joseph B. Scarnati,
Thomas W. Corbett,
Louise B. Williams
Russell A. Walsh,
John E. Wetzel,
Appellants in 09-3017

No. 09-3018

PENNSYLVANIA PRISON SOCIETY;
DOUGLAS HOLLIS; PAROLE PLAINTIFFS,
KEITH SMITH, JACKIE LEE THOMPSON

(Pursuant to F.R.A.P. 12(A))

v.

PEDRO A. CORTES; HONORABLE EDWARD
G. RENDELL; JOSEPH B. SCARNATI,
LT. GOVERNOR; THOMAS W. CORBETT, JR.;
LOUISE B. WILLIAMS; RUSSELL A.
WALSH, Ph.D.; JOHN A. WETZEL

Pennsylvania Prison Society,
Douglas Hollis,
Keith Smith,
Jackie Lee Thompson,
Appellants in 09-3018

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 1-97-cv-01731)
District Judge: Honorable A. Richard Caputo

Argued April 19, 2010

Before: SCIRICA, AMBRO and
ALARCÓN*, Circuit Judges

JUDGMENT

These causes came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and were argued by counsel on April 19, 2010. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court dated June 11, 2009, granting summary judgment in favor of the Pennsylvania Prison Society is hereby REVERSED, and this case is REMANDED to the District Court with instructions to enter an order dismissing this action.

ORDERED and ADJUDGED by this Court that the order of the District Court denying the Pennsylvania Prison Society's request for declaratory and injunctive relief is AFFIRMED.

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* Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

Costs taxed to Pennsylvania Prison Society.

ATTEST:

Marcia M. Waldron
Clerk

Dated: October 1, 2010

Costs taxed in favor of Appellants Joseph B. Scarnati, Thomas W. Corbett, Jr., Louise B. Williams, Russell A. Walsh and John E. Wetzel as follows:

Docketing Fee	$450.00
Brief	$67.73
Reply Brief	$58.17
Appendix	$125.33
TOTAL	$701.23

PENNSYLVANIA PRISON SOCIETY, et al., Plaintiffs, v. PEDRO A. CORTES, Secretary of the Commonwealth of Pennsylvania, et al., Defendants.

CIVIL ACTION NO. 1:CV-97-1731

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

2009 U.S. Dist. LEXIS 48995

June 11, 2009, Decided
June 11, 2009, Filed

COUNSEL: For Pennsylvania Prison Society, Julia D. Hall, Gregory H. Knight, Fight For Lifers, Inc., William Goldsby, Joan Porter, Graterfriends Inc., Joan F. Gauker, Vincent Johnson, Friends Committee To Abolish The Death Penalty, Inc., Kurt Rosenberg, Pennsylvania Abolitionists United Against The Death Penalty, Terry Rumsey, Roger Peter Buehl, Plaintiffs: Gerald C. Grimaud, LEAD ATTORNEY, Tunkhannock, PA; Stephen A. Whinston, LEAD ATTORNEY, Law Office of Stephen A. Whinston, Philadelphia, PA.

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For Honorable Yvette Kane, Secretary of the Commonwealth of Pennsylvania, Defendant: Amy Zapp, LEAD ATTORNEY, PA Office of the Attorney General, Harrisburg, PA; Calvin R. Koons, LEAD ATTORNEY, Attorney General's Office, Litigation Section, Harrisburg, PA; John G. Knorr, LEAD ATTORNEY, Office of the Attorney General, Harrisburg, PA.

For Jackie Lee Thompson, Amicus: Ernest D. Preate, Jr., LEAD ATTORNEY, Law Offices of Ernest D. Preate, Jr., Scranton, PA.

For Commonwealth of Penna., Governor Tom Ridge, Pennsylvania Board of Pardons, Yvette Kane, Secretary of the Commonwealth of Pennsylvania., Governor Mark Mark Schweiker, Governor, Commonwealth of Pennsylvania, C. Michael Weaver, Secretary, Commonwealth of PA, Robert C Jubelier, Chairperson, Board of Pardons, Louise Williams, Member, Board of Pardons, Gerard Massaro, Member, Board of Pardons, Barbara Walrath, Member, Board of Pardons, Defendants: Amy Zapp, LEAD ATTORNEY, PA Office of the Attorney General, Harrisburg, PA.

For Michael Fisher, Member, Board of Pardens, Defendant: Amy Zapp, LEAD ATTORNEY, PA Office of the Attorney General, Harrisburg, PA; Stephen A. Whinston, LEAD ATTORNEY, Law Office of Stephen A. Whinston, Philadelphia, PA.

JUDGES: A. Richard Caputo, United States District Judge.

OPINION BY: A. Richard Caputo

OPINION

MEMORANDUM

Four motions are presently before the Court. The first two motions are Plaintiff Pennsylvania Prison Society's Amended Motion for Summary Judgment (Doc. 82) and Defendants' Motion for Summary Judgment (Doc. 84) on remand, pursuant to the Judgement of the United States Court of Appeals for the Third Circuit. *See Pa. Prison Soc'y v. Cortes,* 508 F.3d 156 (3d Cir. 2007); (Doc. 116). The third and fourth motions presently before the Court are a "Motion to Approve Consent Judgment, Proposed Motion to Intervene" (Doc. 203) and a "Motion to Amend/Correct" the Motion to Approve Consent Judgment (Doc. 207), both filed by Keith Smith and Jackie Lee Thompson.

The Court finds that individual prisoner Plaintiffs Roger Buehl, Vincent Johnson, and Douglas Hollis do not have standing in this action because they have not suffered or shown that they will imminently suffer an injury resulting from the 1997 Amendments to the Pennsylvania Constitution. The Court also finds that organizational Plaintiffs Fight For Lifers, Graterfriends, Friends Committee to Abolish the Death Penalty, and Pennsylvania Abolitionists United Against the Death Penalty do not have standing in this action because these organizations have either ceased to exist or acknowledge that they do not satisfy the requirements necessary for organizational standing. Additionally, the Court

adopts the Third Circuit Court of Appeals' finding that Plaintiffs Julia D. Hall, Gregory H. Knight, William Goldsby, Joan Porter, Joan F. Gauker, Kurt Rosenburg and Diana Hollis have produced no evidence that they have an interest in anything more than mere generalized grievances of concerned citizens, and that such general, non-particularized grievances do not satisfy the constitutional imperative for standing. The Court will, accordingly, dismiss each of these Plaintiffs from the current action.

The Court does, however, find that Plaintiff Pennsylvania Prison Society satisfies all of the requirements needed to qualify for the organizational exception to the prohibition on third party standing and may pursue relief on behalf of its members in this case. The Court will, accordingly, reinstate its March 13, 2006 Order (Doc. 91) granting in part and denying in part Plaintiff's and Defendants' motions for summary judgment (Docs. 82 & 84).

Finally, the Court finds that Keith Smith and Jackie Lee Thompson's interests are adequately represented by an original Plaintiff, the Pennsylvania Prison Society, and that Smith and Thompson's participation in this case would be superfluous and add unnecessary complexities potentially causing undue delay in this case's resolution. The Court will, accordingly, deny Smith and Thompson's motions relating to intervention (Docs. 203 & 207).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1441(a).

BACKGROUND

This case arises from the Plaintiffs' challenge to amendments made to the Constitution of the Commonwealth of Pennsylvania, ratified in 1997 (the "1997 Amendments"). In Pennsylvania, prisoners condemned to death or serving sentences of life imprisonment may not be released on parole except when the Pennsylvania Board of Pardons recommends commutation of a sentence and the Governor approves this recommendation. 61 P.S. § 331.21(a). Prior to 1997, a prisoner seeking a commutation of sentence could obtain a recommendation from the Board of Pardons if a majority of the Board's five members voted in the prisoner's favor. In November of 1997, however, a ballot question proposing to amend the Pennsylvania Constitution was presented to and approved by Pennsylvania voters. Following the 1997 Amendments, a prisoner seeking a commutation of sentence had to receive a unanimous vote of the Board of Pardons for a recommendation to be considered by the Governor. The 1997 Amendments also changed the composition of the Board of Pardons. Prior to the 1997 Amendments, the Board of Pardons consisted of the Lieutenant Governor, the Attorney General, a penologist, a medical professional, and an attorney. After the 1997 Amendments, a crime victim was substituted for the attorney and a corrections officer was substituted for the penologist.

On October 16, 1997, while the 1997 Amendments were still a proposed ballot question, the Plaintiffs filed a petition for review in the Commonwealth

Court of Pennsylvania, challenging the legality of the ballot question. On November 12, 1997, after the ballot question and the 1997 Amendments had been approved by Pennsylvania voters, Defendants removed the action to the United States District Court for the Middle District of Pennsylvania. (Doc. 1.) Plaintiffs filed an amended complaint on January 5, 1998. (Doc. 9.) On January 15, 1998, the Court granted a joint motion to remand the state law claims and to stay the federal claims pending resolution of the state law claims. (Doc. 11.) While the Commonwealth Court found for Plaintiffs, Defendants prevailed upon appeal. *See Pennsylvania Prison Soc. v. Commonwealth,* 727 A.2d 632, 635 (Pa. Commw. Ct. 1999), *rev'd,* 565 Pa. 526, 776 A.2d 971 (Pa. 2001).

Plaintiffs filed a second amended complaint on July 29, 2002. (Doc. 22.) Plaintiffs alleged that the 1997 Amendments deprive them of a reasonable expectation of the availability and reasonable possibility of executive clemency and thereby violate provisions of the United States Constitution, including: the rights of life prisoners and prisoners under death sentence under the Due Process Clause (Count I); the *Ex Post Facto* Clause (Count II); the Equal Protection Clause (Count III); Pennsylvania voters' rights under the Due Process Clause (Count IV); the Eighth Amendment (Counts V and VI); and the Guarantee Clause (Count VII). Plaintiffs also brought claims under the Pennsylvania Constitution (Counts VII and VIII).

Defendants moved to dismiss Plaintiffs' second amended complaint on August 12, 2002. (Doc. 24.) On March 6, 2003, the Court issued a memorandum opinion granting Defendants' motion in part, and denying Defendants' motion in part. (Doc. 43.) The Court dismissed Counts III, IV, V, VI, VII and VIII, as well as the portion of Count I regarding the due process rights of inmates with life sentences. The Court denied Defendants' motion to dismiss the due process claims of inmates under death sentences, as well as Defendants' motion to dismiss Plaintiffs' claim under the *Ex Post Facto* Clause.

In a Memorandum and Order dated March 13, 2006 (Doc. 91) responding to the parties' cross motions for summary judgment, this Court ruled in favor of the Defendants as to all claims, but held that the change in voting requirement from majority to unanimity violated the *Ex Post Facto* clause of the United States Constitution for life-sentenced prisoners. Plaintiffs then filed a motion to Amend or Correct the order (Doc. 93), which the Court denied except to the extent that Plaintiffs were allowed to file a motion for attorneys fees. (June 12, 2006, Mem. & Order, Doc. 98.) On July 11, 2006, Plaintiffs filed a Notice of Appeal (Doc. 103) and Defendants filed a corresponding Notice of Cross Appeal (Doc. 105). The Third Circuit Court of Appeals heard arguments on September 19, 2007 and, on November 5, 2007, vacated that this Court's March 13, 2006 Memorandum and Order, dismissed both appeals without prejudice, and remanded the case to this Court "for

further proceedings consistent with the Opinion of [the Third Circuit Court of Appeals] to develop the record in order to determine plaintiffs' standing to bring this action." *Pa. Prison Soc'y,* 508 F.3d at 169, (Doc. 116).

In accordance with the Circuit Court's judgment, this Court initiated a five-month discovery period to develop the record with regard to Plaintiffs' standing, and held an evidentiary hearing on the standing issue over three days in June and August of 2008. (Dec. 11, 2007 Order, Doc. 124; Evidentiary Hearing Transcripts, Docs. 167, 211, 212.) At the initiation of this discovery period, the Plaintiffs requested that the Court permit intervention of new parties pursuant to Federal Rule of Civil Procedure 24. The Court denied to allow any new parties at that time. (Dec. 11, 2007 Order, Doc. 124.) On December 26, 2007, Plaintiffs submitted a Motion of Reconsideration of the Court's Order denying intervention. (Doc. 125.) The Court denied this motion in an Order dated May 27, 2008. (Doc. 144.)

Following the conclusion of the discovery hearings held in June and August 2008, the parties provided the Court with several filings specifically addressing the issue of standing as identified by the Court of Appeals. On December 22, 2008, Plaintiff Pennsylvania Prison Society filed a "Proposed Findings of Fact" (Doc. 221) and a Brief in Support (Doc. 222) of their Motion for Summary Judgment (Doc. 80) on remand. On December 23, 2008, Plaintiff Doug Hollis filed a "Brief on the Issue of Standing." (Doc.

223.) On January 21, 2009, the Defendants filed a "Post-Hearing Brief Addressing the Issue of Standing." (Doc. 224.) On January 26, 2009, Defendants also provided a "Proposed Findings of Fact." (Doc. 227.) On February 2, 2009, Plaintiff Doug Hollis filed a "Reply Brief" addressing Defendants' arguments on the issue of standing. (Doc. 228.) And finally, on February 15, 2009, Plaintiff Pennsylvania Prison Society filed a "Reply Brief" regarding the Amended Motion for Summary Judgment on remand. (Doc. 231.) As the parties have developed the factual record through a renewed discovery period and three-day evidentiary hearing, and as both Plaintiffs' Motion for Summary Judgment and the underlying issue of standing identified by the Court of Appeals have been thoroughly argued and briefed, the Court believes that the parties' motions for summary judgment are, once again, ripe for disposition.

Additionally, on August 22, 2008, Petitioners Keith Smith and Jackie Lee Thompson, inmates serving terms of life imprisonment, filed a "Motion to Approve Consent Judgment and a Proposed Motion to Intervene." (Doc. 203.) On August 29, 2008, Petitioners Smith and Thompson filed a Motion to "Amend and Correct" their prior motion proposing their intervention into the current matter. (Doc. 207.) The Court received Petitioners' Brief in Support (Doc. 209) of these motions on September 10, 2008, and received Defendants' Brief in Opposition (Doc. 210) on September 19, 2008. Petitioners filed a corresponding Reply Brief on October 3, 2008. (Doc. 215.) As these

motions have been completely briefed, and because they implicate the same issues of standing present in the original Plaintiffs' Motion for Summary Judgment, the Court believes that these two motions are currently ripe for disposition.

DISCUSSION

I. Standing

The question of standing "is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The United States Supreme Court has identified three requirements, derived from Article III of the United States Constitution, that must be met in order for a federal court to adjudicate a particular case.

> This "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); *accord Pa. Prison Soc'y,* 508 F.3d at 160-161. "The case-or-controversy requirement under Article III ensures that 'the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society.'" *Pa. Prison Soc'y,* 508 F.3d at 162 (quoting *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)). "The standing doctrine serves 'to identify those disputes which are appropriately resolved through the judicial process.'" *Id.* (quoting *Lujan,* 504 U.S. at 560).

"In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" *Bennett,* 520 U.S. at 162 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 474-475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)) The first of these "prudential" standing requirements holds that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth,* 422 U.S. at 499. The second prudential standing principle identified by the Supreme Court prevents standing "when the asserted harm is a generalized grievance shared in a substantially equal measure by all or a large class of citizens." *Id.* Finally, the Supreme Court has stated that, in order

for a plaintiff to have standing, he or she must allege that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp,* 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

While the first three, constitutional, standing requirements are "immutable" and must be satisfied without exception, the Supreme Court has recognized certain exceptions to the second three, prudential, standing requirements. Of particular relevance to the case currently before the Court, the Supreme Court has recognized an exception to the prohibition on third party standing and has found that organizations and societies have standing based on injuries to their members. Discussing this exception, the Supreme Court stated that:

> the general prohibition on a litigant's raising another person's legal rights" is a "judicially self-imposed limi[t] on the exercise of federal jurisdiction," not a constitutional mandate. Indeed, the entire doctrine of "representational standing," of which the notion of "associational standing" is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties.

United Food & Commer. Workers Union Local 751 v. Brown Group, 517 U.S. 544, 557, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)) (footnotes omitted). Accordingly, the Supreme Court has stated that "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (citing *NAACP v. Button,* 371 U.S. 415, 428, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)). Identifying the appropriate test for when an "organizational exception" to the prohibition on third party standing is appropriate, the Supreme Court stated that

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *see accord International Union, United Automobile Workers v. Brock,* 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986); *N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *United Food and Commercial Workers v. Brown Group,* 517 U.S. 544, 116 S. Ct.

1529, 134 L. Ed. 2d 758 (1996); *Pa. Prison Soc'y*, 508 F.3d at 163; *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 70 (3d Cir. 1990).

Mindful of these requirements, the Court now considers the issue of standing with respect to the various categories of plaintiffs in this action.

A. Individual Prisoner Plaintiffs

Three individual prisoner Plaintiffs are participating in the current action. The Plaintiffs' Second Amended Complaint identified these Plaintiffs as follows:

> Plaintiff, Roger Buehl, AM-7936, was, at the time this case was filed, a death-sentenced prisoner convicted and sentenced prior to November 4, 1997. He was among approximately two hundred twenty (220) death sentenced individuals in Pennsylvania who may seek relief through the Pardons Board.
>
> Plaintiff Vincent Johnson, AF-3422, SCI-Camp Hill, is a life-sentenced prisoner who was convicted on August 7, 1993, of aggravated robbery and murder in the first degree for a murder committed on or about November 5, 1971. He has filed application[s] with the Board of Pardons on the following dates: April 2, 1991; April 27, 1992; October 24, 1994; and May 23, 1997. His latest application was denied in 1998 by a 2-3 vote.
>
> Plaintiff Douglas Hollis, AF-6355, is a life-sentenced prisoner currently incarcerated at

> SCI-Coal Township. Prior to the 1997 Amendments, he filed an application to the Board of Pardons and received approval of his commutation by a 4-1 vote of the Board, but was rejected by Governor Robert Casey. He subsequently filed another application to the Pardons Board, which was denied.

(Doc. 22 PP 10-12.)

In its review of this Court's March 13, 2006 Memorandum and Order, the Third Circuit Court of Appeals found that:

> Crucially, the record contains no evidence that any of these prisoner plaintiffs have received or may expect to receive a majority vote (i.e., 3-2 or 4-1) of the Board of Pardons after the 1997 Amendments. Such allegations (on a motion to dismiss) or a showing by affidavit or other evidence (on a motion for summary judgment) of a 3-2 or 4-1 vote of the Board could demonstrate that a plaintiff was injured by the 1997 Amendments.
>
> The complaint does not allege and the record contains no evidence that any of these prisoner plaintiffs has had any actual injury or presently has an application pending before the Board of Pardons. Nor does the complaint allege or the record evidence show that any of the prisoner plaintiffs has immediate plans to file such an application. Nor is there any record evidence to suggest that these specific prisoner plaintiffs, even should they apply, are likely to have received

a recommendation for commutation under the pre-1997 regime, for ultimate decision by the Governor. The only allegation concerning these prisoner plaintiffs' commutation prospects is the very general prediction that "[s]aid plaintiffs will, in the future, apply for executive clemency through the Board."

* * *

Here, prisoner plaintiffs have not demonstrated (1) "actual or imminent" harm because they failed to allege or adduce evidence of any concrete plans to apply for a commutation in the immediate future; nor (2) "distinct and palpable" injury because they have not shown that, even if they do apply to the Board of Pardons, they are sufficiently likely to be personally harmed by the changed voting requirement in the 1997 Amendments – i.e., that they are likely to receive a majority of votes favoring a commutation recommendation from the Board.

* * *

Even if prisoner plaintiffs had alleged and sufficiently introduced evidence that they had imminent plans to file an application for a commutation, they would still fail to demonstrate injury in fact because they have not shown a sufficient *likelihood* that they *personally* would be harmed by the change in voting requirements wrought by the 1997 Amendments.

Pa. Prison Soc'y, 508 F.3d at 165-166. The Court of Appeals further noted that "[n]one of the prisoner plaintiffs can establish a 'concrete and particularized' injury without having obtained at least three votes in the Board – which would have been sufficient for its recommendation of commutation of sentence before the 1997 Amendments but are insufficient under the current provisions." *Id.* at 167.

1. Plaintiff Roger Buehl

As already mentioned, this Court, in accordance with the Circuit Court's Judgment, initiated a five-month discovery period in order to develop the record with regard to Plaintiffs' standing. The Court also held an evidentiary hearing over a combined three day period in June and August of 2008. At the start of that hearing, Plaintiffs' counsel represented to the Court that

> Roger Buehl, has had his sentence vacated, was retried, resentenced to life in prison and has answered interrogatories . . . saying that he has no current intention of applying for commutation. So he will not meet the standard set down by the third circuit [sic] in its opinion, and [Plaintiffs] will not present any further evidence regarding Mr. Buehl.

(June 2, 2008 Trans., Doc. 167, at 3:20-4:1.) Based on this representation, and finding no other evidence indicating that the 1997 Amendments caused Mr. Buehl injury, the Court finds that Mr. Buehl does not

have standing and will dismiss him from the current action.

The remaining two individual prisoner Plaintiffs, Vincent Johnson and Douglas Hollis, both argue that they have standing under the standard articulated by the Third Circuit Court of Appeals. Plaintiffs Johnson and Hollis both offered testimony during the evidentiary hearing before this Court in June and August 2008.

2. Plaintiff Vincent Johnson

In his testimony, Plaintiff Vincent Johnson described his efforts to obtain a commutation of his sentence, stating that he last applied for commutation in 1998, at which time he received a public hearing, but was not recommended for commutation based on a two-to-three (2-3) vote by the Board of Pardons.[1] (Aug. 6, 2008 Trans., Doc. 211, at 74:16-75:9.) Plaintiff Johnson acknowledged that, based on his 1998 application and resulting vote, his sentence would not have been reviewed by the Governor of Pennsylvania under either the pre- or post-1997 rules. (*Id.* at 75:10-12.) Plaintiff Johnson also explained that he had not made a similar application since 1998, but had collected information and

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[1] By way of clarification, the Court notes that two (2) Board of Pardons members voted in favor of recommending Plaintiff Johnson's sentence for commutation, while three (3) members voted against recommending commutation.

completed a draft of a new application that he planned to file following the completion of pending state proceedings in his case. (*Id.*, at 75:13-77:6; 78:9-79:10.)

In their Post-Hearing Brief Addressing the Issue of Standing, the Defendants identify the first prong of the two-part test for standing articulated by the Third Circuit Court of Appeals in this case as "the requirement of a pending application or a concrete plan to submit one on the immediate future. . . ." (Doc. 224, at 6.) According to Defendants, "Johnson . . . is nowhere close to satisfying this requirement," because he testified that planned to file an application on some unknown future date and, as a result, "the requisite 'high degree of immediacy' needed for this aspect of standing is absent. . . ." (*Id.*) In response to Defendants' arguments regarding Johnson's standing, Plaintiffs note that the Board of Pardons maintains a policy of not entertaining commutation petitions while post-conviction challenges remain active. (Pa. Pr. Soc. Prop. Supp. Findings of Fact, Doc. 221 P 83; Doc. 149, Ex. 7.)

Based on its review of the arguments and evidence presented, the Court finds that Plaintiff Vincent Johnson does not have standing in the current case. While the record clearly indicates that Mr. Johnson has been an exemplary inmate for the substantial majority of his sentence, he has not shown that he has suffered an injury due to the 1997 amendments to the Pennsylvania Constitution. The Court takes particular note of the Plaintiffs' argument that Mr. Johnson's state court challenges to his

sentence foreclose him from applying for commutation or would hurt an application's chance of success. While the Board of Pardons does clearly state that exhaustion of other legal remedies is considered as a factor when the Board reviews commutation of sentence applications, (*see* Doc. 149, Ex. 7), Mr. Johnson testified that he had previously filed commutation applications while other challenges to his sentence were still pending (Doc. 211, at 75:17-76:7). Moreover, the Court does not read the Board of Pardons' list of relevant factors as prohibiting commutation applications during the pendency of other challenges a prisoner may have made concerning his conviction or sentence.

While the evidence produced by Mr. Johnson throughout this case suggests that he possesses many attributes improving his chance of receiving a majority vote from the Board of Pardons recommending that his sentence be reviewed by the Governor, Mr. Johnson has not been successful in obtaining such a majority vote since the 1997 Amendments went into effect. Accordingly, the Court finds that Mr. Johnson's commutation applications have not been impacted by the 1997 Amendments to the Pennsylvania Constitution. As already mentioned, the Court is aware that Mr. Johnson plans to file a new commutation application, creating a possibility that he will successfully obtain a majority vote from the Board of Pardons. However, the Court finds that the possibility of Mr. Johnson receiving a Board of Pardons' majority vote at some indeterminate future date does not constitute

an "imminent" injury sufficient to provide Mr. Johnson with standing in the current case. Based upon its finding that Mr. Johnson has not suffered and will not imminently suffer an injury due to the 1997 Amendments, the Court determines that Plaintiff Vincent Johnson does not have standing and will dismiss him from the current action.

3. Plaintiff Douglas Hollis

In his testimony before this Court, Plaintiff Douglas Hollis recounted his several commutation applications. Notably, Plaintiff Hollis testified that, in 1992, he received a four-to-one (4-1) vote from the Board of Pardons, resulting in a review, and subsequent denial, of Mr. Hollis' application by then-Governor Robert Casey. (Doc. 211, at 104:13-24.) Mr. Hollis, however, also testified that his subsequent, 1994 application received a one-to-four (1-4) Board of Pardons vote against a recommendation to the Governor. (*Id.*, at 105:18-21.) In addition to these past applications, Mr. Hollis also stated that he currently has an application pending with the Board of Pardons that he filed in October 2007. (*Id.*, at 105:24-106:3.)

In addition to his recounting of his prior application efforts, Plaintiff Hollis has provided the Court with substantial testimony and arguments supporting his contention that he is likely to receive a majority vote from the Board of Pardons. Notably, Plaintiff Hollis testified that numerous people have offered him statements of support, spoke about his

relationship with his family, and provided details about the many leadership, educational and work-related accomplishments he has achieved while serving his sentence. (*Id.*, at 106:23-111:3.) Mr. Hollis also expressed remorse for his crime, and noted that he had received the Pennsylvania Prison Society's "Inmate of the Year" award in 2002. (Aug. 6, 2008 Trans., Doc., at 4:8-6:11, 7:13-16.) In his Brief on the Issue of Standing, Plaintiff Hollis also offers an explanation for the 1994 one-to-four Board of Pardons vote against a recommendation to the Governor stating that

> [Hollis' 1994] hearing was held immediately in the aftermath of the emotionally charged atmosphere of the November 1994 Gubernatorial election, wherein Lieutenant Governor Singel had lost to Governor Ridge, in part based upon Singel's recommendation to commute the life sentence of Reginald McFadden, who turned around and committed a murder and rape in New York less than a year after he got out.

(Doc. 223, at 15.) Accordingly, Hollis argues that "little weight should be accorded to this record vote, given the harsh atmosphere in Pennsylvania at that time against lifer commutations." (*Id.*)

In contrast, the Defendants argue that Hollis has "not demonstrated that there is a substantial likelihood that [he] will be harmed by the 1997 amendments, *i.e.*, that [he is] likely to receive a majority, but not unanimous, vote by the Board on an application

for commutation." (Doc. 224, at 7.) Notably, the Defendants argue that the evidence produced by both Plaintiffs Hollis and Johnson "serves to establish only how a very differently composed Board operated during a discrete period of time in the now distant past" and that they have "presented no evidence that the same type of evaluation exists *today*. (*Id.*, at 7-8) (emphasis original). The Defendants continue by stating,

> This is a critical – indeed, a fatal – omission given the nature of executive clemency in Pennsylvania. Whether a recommendation to the Governor will be made, hinges solely on the unique, personal views of the five individuals who comprise the Board. Over time, the Board's membership has changed. Plaintiffs have presented no evidence establishing how precisely an application would be evaluated, let alone voted upon, by members of the current Board.

(*Id.*, at 8) (internal citations omitted.) Summarizing this argument, the Defendants state that "plaintiffs have not shown what may have been the case in the past is the case now, and as a result, there is no reliable way of predicting the fate of an application at present." (*Id.*, at 8-9.)

The Defendants also present several arguments suggesting that Hollis would not, or will not, receive a Board of Pardons recommendation for review. In particular, Defendants note that the statistics tracking recommended commutations for life sentences

between 1989 and 2005 show that, after 1995, the number of Board recommendations dropped significantly, and that in six (6) of the eleven (11) years between 1995 and 2005 the Board of Pardons made no recommendations to the Governor. (*Id.* at 9.) Defendants also point to statistics showing that commutation applications are rarely successful in reaching the merits review stage where a Board of Pardons' recommendation vote occurs. (*Id.*, at 10.) According to the Defendants, "the important consideration [when granting or denying a Board of Pardons merits review] is not whether [applicants] are good candidates, but whether their applications are likely to be in the very small number that clear the hurdle of merit review." (*Id.*, at 11.) Defendants contend that "[t]here is nothing here to establish that plaintiffs' applications exceed those of other 'good' applicants." (*Id.*)

The Defendants further argue that "even if it could be said that [Plaintiffs Hollis or Johnson] have demonstrated it was likely they would actually reach the point where they would be subject to the unanimous vote requirement, the record still fails to establish that it is likely that they would be adversely affected." (*Id.*) In this regard, the Defendants note that, in the last ten years, when the Board of Pardons voted on the merits of prisoners' commutation applications, there has been an almost identical number of majority votes and unanimous votes. Defendants, accordingly, argues that this statistic shows that "it is equally likely that plaintiffs would *not* be harmed,

since a unanimous vote would not qualify as such." (*Id.*, at 12) (emphasis original).

Finally, with specific regard to Plaintiff Hollis, the Defendants state:

> On Hollis' last application, in November 1994, the vote was 1-4 *against* a recommendation to the Governor. Though plaintiffs attempt to explain this emphatic rejection of his application [as] a consequence of the then-recent incident involving pardoned lifer Reginald McFadden, the statistical information about the Board's disposition of applications, shows it to be consistent with its overall handling of the others it considered during the last fifteen years . . . those statistics establish that it is rare that an application will ever involve a "majority" vote.

(*Id.*, at 12-13) (emphasis original).

Based on the parties' arguments and the evidence produced during the renewed discovery period, the Court finds that Plaintiff Douglas Hollis has not shown that he has suffered, or will imminently suffer, an injury stemming from the 1997 Amendments to the Pennsylvania Constitution, and thus, does not have standing in the current case. The Court takes particular note that Mr. Hollis has previously been successful in obtaining a majority Board of Pardons' vote recommending review to the Governor, and also notes that Mr. Hollis appears to have been an exemplary inmate, possessing many traits that will improve his chances of successfully navigating the

commutations process. However, the Court believes that both Mr. Hollis' personal commutation application history, along with the general commutations application review "trends" identified by the Defendants, show that the injury claimed by Mr. Hollis is, at this time, speculative. In light of evidence showing disparate outcomes for applications made by prisoners with similar characteristics and the disparate votes from Hollis' last two Board of Pardons reviews, the Court is unable to make any determination as to whether Hollis is likely to receive a majority vote in favor of review on the application currently pending before the Board of Pardons. Based on the evidence in this case, the Court finds that Hollis has shown only that there is a possibility that he may receive a majority vote, and thus, be harmed by the 1997 Amendments. However, a potential injury, happening on some indeterminate future date is neither concrete nor particularized nor imminent, and does not satisfy the "irreducible constitutional minimum" of standing established by Article III. *See Bennett,* 520 U.S., at 167. As such, the Court finds that Plaintiff Hollis does not have standing to bring the present action and will dismiss him from this case.

B. Organizational Plaintiffs

Five organizational Plaintiffs are participating in the current action. The Plaintiffs' Second Amended Complaint identified these Plaintiffs as follows.

Plaintiff, Pennsylvania Prison Society, Inc. ("PPS"), is a non-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. The Society was founded in 1787 and has as [sic] its principal offices at 2000 Spring Garden Street, Philadelphia, Pennsylvania 19103-3805. The purpose of PPS is to advocate for a humane, just, and restorative correctional system, and to promote a rational approach to criminal justice issues. PPS brings this action in its own right and on behalf of its members, including prisoners and adult individuals interested in its above-mentioned purposes

Plaintiff, Fight fir Lifers, Inc. ("Lifers"), is a non-profit corporation, having its principal office address [at] P.O. Box 7691, Philadelphia, Pennsylvania 19101. The purpose of Lifers is to provide support to all life sentenced prisoners in Pennsylvania concerning their just and fair treatment in the correction and justice system of Pennsylvania. Lifers' mission is to educate the public as to the realities of serving a life sentence in the Commonwealth of Pennsylvania, including the necessary of parole review for life sentence prisoners on a case-by-case basis and to provide support through the commutation application process for deserving individual lifers. Lifers also acts as a network communicating with all life sentenced prisoners providing information, comfort, hope and support to those sentenced and their families and friends.

Plaintiff, Graterfriends, Inc. ("Graterfriends"), is a non-profit corporation, having its principal office address at 2323 Carol Lane, Norristown, PA 19401. It's [sic] membership totals approximately 3,300 individuals, many of whom are life-sentenced prisoners. Graterfriends advocates on behalf of and provides support to all life sentenced prisoners as well as other prisoners, their families and friends and has regularly published a newsletter informing its members and others of matters involving prisoners' treatment, and other matters. It also acts a public advocate for the just and fair treatment in prison of its members and all sentenced prisoners.

Plaintiff, Friends Committee To Abolish The Death Penalty, Inc. ("Friends Committee"), is a non-profit corporation, having its principal office address at P.O. Box 7691, Philadelphia, Pennsylvania. The purpose of Friends Committee is to advocate for the abolishment of the death penalty in Pennsylvania, to advocate for and counsel death sentenced inmates incarcerated in Pennsylvania on issues relating to their treatment in the correctional system, individually and as a class, and also on issues relating to their particular cases.

Plaintiff, Pennsylvania Abolitionists United Against The Death Penalty ("Abolitionists"), in an unincorporated association, and is a project of the New Society Educational Foundation, Inc., a 501(c)(3) not for profit Pennsylvania corporation with offices in Philadelphia, Pennsylvania. Abolitionists

> has offices at 240 South Ridley Creek Road, Media, Pennsylvania. The purpose of Abolitionists is to advocate for the abolishment of the death penalty in Pennsylvania, to advocate for just and fair treatment of those incarcerated on death row in Pennsylvania, to provide support to those on death row and their families, to educate the public at large as to the reasons why the death penalty should be abolished and to work with and support the family members of murder victims.

(Doc. 22 PP 5-9.)

In its review of this Court's March 13, 2006 Memorandum and Order, the Third Circuit Court of Appeals reviewed the prudential limitation on organizational standing, along with the recognized exceptions to this limitation, and found that [t]he record of this case reveals that neither of

> [the] exceptions [to the prohibition on organizational standing] applies to the organizational plaintiffs here. There is no evidence in the record that these organizations as entities suffered any harm from the 1997 Amendments. Nor are there any allegations to that effect in the unverified complaint.
>
> Moreover, with regard to standing in a representational capacity, the record is silent about the organizational plaintiffs' members and whether those members themselves meet the standing requirements to bring this case. The complaint contains only a bare and

> inadequate statement that plaintiff Pennsylvania Prison Society "brings this action in its own right and on behalf of its members, including prisoners and adult individuals interested in its above mentioned purposes." Similarly, although the complaint alleges that plaintiff Graterfriends' "membership totals approximately 3,300 individuals, many of whom are life sentenced prisoners," there are no specific facts in the record regarding Graterfriends' individual members and whether any of them meets the standing requirements to pursue the present claims. Neither has Graterfriends itself carried its burden of establishing its own standing by record evidence.
>
> The standing of the remaining organizational plaintiffs – Fight for Lifers, Friends Committee to Abolish the Death Penalty and Pennsylvania Abolitionists United Against the Death Penalty – suffers from the same defects.

Pa. Prison Soc'y, 508 F.3d at 163-165 (citations omitted).

1. Plaintiffs Fight For Lifers, Graterfriends, Friends Committee to Abolish the Death Penalty, and Pennsylvania Abolitionists United Against the Death Penalty

At the beginning of the evidentiary hearing held by the Court as part of the renewed period of

discovery in this case, Plaintiffs' counsel represented to the Court that "[a]ll the organizations other than the Pennsylvania Prison Society have either ceased to exist or do not purport to meet the criteria for organizational standing." (June 2, 2008 Trans, Doc. 167, at 3:17-19.) Based on this representation, and finding no other evidence indicating that these Plaintiffs satisfy either of the criteria providing an exception to the general prohibition on organizational standing, the Court finds that Plaintiffs Fight For Lifers, Graterfriends, Friends Committee to Abolish the Death Penalty, and Pennsylvania Abolitionists United Against the Death Penalty do not have standing and will dismiss these Plaintiffs from the current action.

2. Plaintiff Pennsylvania Prison Society

On June 2, 2008, the first day of a three-day evidentiary hearing concerning the issue of standing, the Plaintiffs sought to introduce evidence and testimony in attempt to show that the Pennsylvania Prison Society does, in fact, have standing in the current action. When Plaintiffs sought to introduce this evidence, the Defendants argued that the "law of the case at this point . . . [states that] the prison society is not entitled to try to gain standing at this point. It's already been ruled upon by the third circuit." (June 2, 2008 Trans., Doc. 167, at 6:19-23.) In response, Plaintiffs argued that the Third Circuit Court of Appeals' decision referred only to the organizations that Plaintiffs acknowledge do not have standing. (*Id.*, at 7:4-6.) Thus, Plaintiffs argued that

"the prison society does have standing and it is in the exact same position as the individual inmates in terms of not having had the ability to show standing because it wasn't an issue before." (*Id.*, at 7:6-10.) After receiving the parties' respective arguments, the Court noted that the Court of Appeals' opinion "leave[s] open the question of whether or not [the Pennsylvania Prison Society] can establish the representative capacity of their organization and if there are people who are members of the organization who would otherwise have standing. . . ." (*Id.*, at 8:14-18.) The Court allowed the parties to present evidence concerning the organizational standing issue and deferred ruling on whether or not the issue was foreclosed by the Court of Appeals' judgment. (*Id.* at 8:22-9:2.) Accordingly, the first question before the Court with respect to Plaintiff Pennsylvania Prison Society is whether or not the Court of Appeals November 5, 2007 decision constitutes a final decision concerning the Pennsylvania Prison Society's standing in this action.

Reviewing the Court of Appeals' decision in this case, the Court first observes that the Third Circuit Court found that "there is no evidence in the record that [the] organizations as entities suffered any harm from the 1997 Amendments . . . , [and] the record is silent about the organizational plaintiffs' members and whether those members themselves meet the standing requirements to bring this case." *Pa. Prison Soc'y*, 508 F.3d at 163. The Court of Appeals also found in a subsequent section that "the voter/taxpayer

plaintiffs, *just as the organizational plaintiffs,* do not satisfy the constitutional imperative for standing." *Id.* at 164 (emphasis added). While the Defendants argue that this finding is evidence of the Court of Appeals' intent to foreclose the Pennsylvania Prison Society from presenting this Court with evidence concerning its standing to sue, this Court notes that, in the final line of its November 7, 2007 opinion, the Court of Appeals instructed this Court to conduct "further proceedings . . . to develop the record in order to determine *plaintiffs'* standing to bring this action." *Id.*, at 169 (emphasis added). Taking particular note that the Court of Appeals did not specify certain individuals or classes of Plaintiffs in this final statement, this Court believes that the Court of Appeals' decision instructs this Court to develop the record and determine standing for all plaintiffs in the current case, including the Pennsylvania Prison Society. Having, thus, determined that the Court of Appeals' November 5, 2007 decision does not prevent Plaintiff Pennsylvania Prison Society from presenting evidence and arguments concerning its standing in the present case, the next question before the Court is whether the Prison Society has produced evidence that it does, in fact, have standing to appear before the Court in the current action.

As already discussed, an organization whose members are injured may represent those members in a proceeding for judicial review when the organization's members would otherwise have standing to sue in their own right, the interests the organization

seeks to protect are germane to the organization's purpose, and neither the asserted claim nor requested relief requires the organization's individual members to participate in the lawsuit. *Sierra Club,* 405 U.S. at 739 (citing *Button,* 371 U.S. at 428); *Hunt,* 432 U.S. at 343. During the three-day evidentiary hearing before this Court, Mr. William DiMasco, the executive director of the Pennsylvania Prison Society, testified about the organization's history, purpose, and interest in the current litigation. (*See* June 2, 2008 Trans., Doc. 167, at 9:9-34:19.) As part of his testimony, Mr. DiMasco stated that approximately one hundred (100) of the Prison Society's members are life-sentenced prisoners, and that a number of these prisoners have filed for commutation. (*Id.,* at 10:15-21.) Mr. DiMasco further testified that two of these members, Jackie Lee Thompson and Keith Smith, are life-sentenced prisoners that have received four-to-one (4-1) votes from the Board of Pardons in favor of recommending their applications for review by the Governor since the 1997 Amendments took effect. (*Id.,* at 10:22-11:6.) Mr. Smith and Mr. Thompson also provided testimony concerning their commutation applications, including the majority Board of Pardons votes they received in 2005 and 2004, respectively. (Aug. 6, 2008 Trans., Doc. 211, at 13:22-18:13, 50:9-23.) Mr. Smith and Mr. Thompson also testified that they currently are members of the Pennsylvania Prison Society. (*Id.,* at 26:19-27:2, 56:13-19.) Accordingly, Plaintiff Pennsylvania Prison Society argues (1) that Mr. Smith and Mr. Thompson suffered an injury from the 1997 Amendments when their applications

were not forwarded to the Governor for review, in spite of a majority vote from the Board of Pardons, and (2) that their status as Prison Society members allows the Prison Society to bring the current action on their behalf. (Doc. 222, at 5-8.)

Defendants, in contrast, argue that neither Mr. Smith nor Mr. Thompson are parties to the current litigation and that "it is inappropriate for plaintiffs to try to bootstrap standing in such fashion . . . [because] intervention is not a vehicle for reviving an action." (Doc., at 14.) Defendants also argue that the plaintiffs failed to pursue organizational standing before the Third Circuit Court of Appeals, and have therefore "waived the issue and cannot seek to now litigate it in this court." (*Id.*, at 15.)

The Court agrees with the general principal invoked by the Defendants that standing to bring an action cannot be achieved via intervention by parties that were not originally included in the litigation. *See McKay v. Heyison,* 614 F.2d 899, 906 (3d Cir. 1980) ("[a] motion for intervention under Rule 24 is not an appropriate device to cure a situation in which plaintiffs may have stated causes of action that they have no standing to litigate."); *see also Fuller v. Volk,* 351 F.2d 323, 328 (3d Cir. 1965) ("intervention will not be permitted to breath life into a 'nonexistent' law suit."). The Court, however, believes that the Pennsylvania Prison Society has presented sufficient evidence to show that its involvement in this case satisfies the so-called "organizational exception" to the prohibition on third party standing and that the

Prison Society's standing to bring this action on behalf of its members is appropriate regardless of Mr. Smith and Mr. Thompson's attempted intervention in this case.

As already noted,

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343. In the current case, two members of the Pennsylvania Prison Society, Mr. Smith and Mr. Thompson, testified that they have received four-to-one (4-1) Board of Pardons votes after the 1997 Amendments took effect. Thus, Mr. Smith and Mr. Thompson suffered an injury due to the 1997 Amendments when their applications were not forwarded to the Governor for review, and would both have standing to sue in their own right. Second, the Court believes that the interests that the Pennsylvania Prison Society now seeks to assert are certainly germane to the Prison Society's purpose, as stated in the Second Amended Complaint, "to advocate for a humane, just, and restorative correctional system, and to promote a rational approach to criminal justice issues." (Doc. 22, P 5.) Finally, the Court does not believe that either the claim asserted or the relief requested requires the participation of individual

Prison Society members in the lawsuit since this suit alleges that the 1997 Amendments to the Pennsylvania Constitution impact several life-sentenced prisoners in Pennsylvania and violate the *Ex Post Facto* Clause of the United States Constitution. Accordingly, the Court finds that the evidence clearly shows that Pennsylvania Prison Society satisfies all of the requirements needed to qualify for the organizational exception to the prohibition on third party standing and may pursue relief on behalf of its members.

In its March 13, 2006 Memorandum and Order, the Court granted summary judgment in favor of the Plaintiffs on the basis of its finding that

> [t]o retroactively apply changes in the voting requirements of the Board of Pardons, from requiring a majority to requiring unanimity, following the 1997 amendments that adversely affect the length of punishment for life sentenced prisoners seeking commutation, violates the *Ex Post Facto* Clause."

(Doc. 91, at 19.) Pursuant to the Third Circuit Court of Appeals' Judgement, the Court granted an extended period of discovery allowing the parties to develop the record on the issue of standing and, on the basis of evidence produced through this discovery period, has determined that the Pennsylvania Prison Society does, in fact, have standing to sue in the current action. Accordingly, the Court will, on the basis of the findings set forth in its March 13, 2006 Memorandum and Order, grant summary judgment

in favor of Plaintiff Pennsylvania Prison Society on its *Ex Post Facto* claim concerning the change in voting requirements.

C. Voter/Taxpayer Plaintiffs

In its decision, the Court of Appeals' discussed the seven named Plaintiffs in this litigation "who are adult, competent individuals residing in Pennsylvania, and are qualified voters and taxpayers in Pennsylvania." *Pa. Prison Soc'y,* 508 F.3d at 164. After finding that "there is no evidence that these individuals have an interest in anything more than mere generalized grievances of concerned citizens" and reviewing the general prohibition on standing based on general, non-particularized grievances, the Court of Appeals held that "the voter/taxpayer plaintiffs . . . do not satisfy the constitutional imperative for standing." *Id.*

The Plaintiffs presented no further evidence in favor of standing for the voter/taxpayer Plaintiffs during the expanded discovery period. Thus, the Court finds that these Plaintiffs do not have standing to bring the current action and will dismiss them from this case.

II. Intervention

Rule 24 of the Federal Rules of Civil Procedure provides for a person's intervention into an existing action. There are two distinct types of intervention – intervention as of right, see Fed. R. Civ. P. 24(a), and

permissive intervention, see Fed. R. Civ. P. 24(b). In their Motion to Intervene, Mr. Smith and Mr. Thomson ask this Court "to allow them to intervene" in the current litigation. Rule 24(b) governs permissive intervention, providing that:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(b). The Court has discretion under Rule 24(b) to grant or deny an application for permissive intervention. *Id.*; *see also Hoots v. Pennsylvania,* 672 F.2d 1133, 1135-36 (3d Cir. 1982).

> The burden . . . is on the applicant for intervention to show that his interests are not adequately represented by the existing parties. This burden may be discharged in two ways. The applicant may demonstrate that is interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interest proper attention. Alternatively, the applicant may establish collusion between the representative and an opposing party, or an indication that the representative has not been diligent in prosecuting the litigation.

Hoots, 672 F.2d at 1135 (citations omitted). When "the interests of the applicant in every manner match

those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be "undue." *Id.* at 1136.

On the basis of the discretion provided to district courts by Federal Rule 24(b), the Court will deny Mr. Smith and Mr. Thompson's Motion to Intervene in the current case. In reaching its decision to deny Smith and Thompson's motion, the Court first notes that the sole remaining Plaintiff in the current action, the Pennsylvania Prison Society, has zealously pursued this litigation since October of 1997. The Court finds no evidence, and Mr. Smith and Mr. Thompson present no argument, suggesting that the Pennsylvania Prison Society has not been diligent in prosecuting the current litigation or has not given the interests of its constituent members adequate attention. Second, the Court takes note that Mr. Thompson and Mr. Smith did not attempt to intervene into the current action until December 2007, after the Court of Appeals had vacated this Court's Order granting summary judgment and remanded the case for further proceedings, even though Smith and Thompson testified that they received their majority Board of Pardons votes more than two years before their attempted intervention.

Thus, the Court believes (1) that the interests of Mr. Smith and Mr. Thompson are adequately represented by the Pennsylvania Prison Society and

(2) that their intervention into this case, after this Court's grant of summary judgment and the Court of Appeals' remand, would be purely superfluous and add unnecessary complexities that could potentially cause undue delay in the resolution of this case. The Court will, accordingly, exercise its discretion and deny Keith Smith and Jackie Lee Thompson's Motion to Intervene.

CONCLUSION

For the reasons set forth above, the Court finds that individual prisoner Plaintiffs Roger Buehl, Vincent Johnson, and Douglas Hollis do not have standing and will be dismissed from the current case. The Court also finds that organizational Plaintiffs Fight For Lifers, Graterfriends, Friends Committee to Abolish the Death Penalty, and Pennsylvania Abolitionists United Against the Death Penalty do not have standing and will dismiss these Plaintiffs from the current action. The Court also finds that so-called "voter" Plaintiffs Julia D. Hall, Gregory H. Knight, William Goldsby, Joan Porter, Joan F. Gauker, Kurt Rosenburg and Diana Hollis do not have standing and will dismiss these Plaintiffs from the current action.

The Court does, however, find that Plaintiff Pennsylvania Prison Society satisfies the requirements to qualify for the exception to the general prohibition of third-party standing. Since the Prison Society has standing to assert the rights of its members in the

current case, the Court will reinstate its March 13, 2006 Memorandum and Order in which the Prison Society's motion for summary judgement was granted, in part, with regard to the Prison Society's *ex post facto* claim concerning the change in voting requirements. This reinstated Order also denies the Prison Society's summary judgment motion with respect to the Plaintiff's *ex post facto* claim relating to the inclusion of a crime member on the Board of Pardons. Likewise, the reinstated Order grants Defendants' motion for summary judgment with respect to Plaintiff's due process claim and *ex post facto* claim concerning the inclusion of a crime victim on the Board, while denying Defendants' motion with respect to the Prison Society's *ex post facto* claim concerning the change in voting requirements.

Finally, having found that their interests are adequately represented by original Plaintiff, the Pennsylvania Prison Society, and that their participation in this case would be purely superfluous and add unnecessary complexities potentially causing undue delay in the case's resolution, the Court will deny Keith Smith and Jackie Lee Thompson's Motion to Intervene.

An appropriate order follows.

June 11, 2009

Date

/s/ A. Richard Caputo

A. Richard Caputo

ORDER

NOW, this 11th day of June, 2009, **IT IS HEREBY ORDERED** that:

(1) Individual prisoner Plaintiffs Roger Buehl, Vincent Johnson, and Douglas Hollis; organizational Plaintiffs Fight For Lifers, Graterfriends, Friends Committee to Abolish the Death Penalty, and Pennsylvania Abolitionists United Against the Death Penalty; and "voter" Plaintiffs Julia D. Hall, Gregory H. Knight, William Goldsby, Joan Porter, Joan F. Gauker, Kurt Rosenburg and Diana Hollis are **DISMISSED** from this case for lack of standing.

(2) The Court's March 13, 2006 Order (Doc. 91) is **REINSTATED** with respect to Plaintiff Pennsylvania Prison Society:

(A) Defendants' Motion for Summary Judgment (Doc. 84) is **GRANTED in part** and **DENIED in part**:

(i) Defendants' motion is **GRANTED** with regard to Plaintiff's Due Process claim.

(ii) Defendants' motion is **GRANTED** with respect to Plaintiff's *Ex Post Facto* claim concerning the inclusion of a crime victim on the Board.

(iii) Defendants' motion is **DENIED** with respect to Plaintiff's *Ex Post Facto* claim concerning the change in voting requirements.

(B) Plaintiff's Amended Motion for Summary Judgment (Doc. 82) is **GRANTED in part** and **DENIED in part**:

(i) Plaintiff's motion is **DENIED** with respect to Plaintiff's *Ex Post Facto* claim concerning the inclusion of a crime victim on the Board.

(ii) Plaintiff's motion is **GRANTED** with respect to Plaintiff's *Ex Post Facto* claim concerning the change in voting requirements.

(3) Keith Smith and Jackie Lee Thompson's Motion to Approve Consent Judgment, Proposed Motion to Intervene (Doc. 203) and Motion to Amend/Correct the Motion to Approve Consent Judgment (Doc. 207) are **DENIED**.

(4) The Clerk of the Court shall mark this case **CLOSED**.

/s/ A. Richard Caputo

A. Richard Caputo
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-3017

PA PRISON SOCIETY; JULIA D. HALL; GREGORY H. KNIGHT; FIGHT FOR LIFERS INC; WILLIAM GOLDSBY; JOAN PORTER; GRATERFRIENDS INC.; JOAN F. GAUKER; VINCENT JOHNSON; FRIENDS COMMITTEE TO ABOLISH THE DEATH PENALTY INC.; KURT ROSENBERG; PENNSYLVANIA ABOLITIONISTS UNITED AGAINST THE DEATH PENALTY; TERRY RUMSEY; ROGER BUEHL; DOUGLAS HOLLIS; DIANNA HOLLIS

v.

PEDRO A. CORTES, Secretary, Commonwealth of Pennsylvania; HONORABLE EDWARD G. RENDELL; JOSEPH B. SCARNATI, LT GOVERNOR; THOMAS W. CORBETT, JR.; LOUISE B. WILLIAMS; RUSSELL A. WALSH, PhD.; JOHN E. WETZEL

(Pursuant to Fed. R. App. P. 43)

Joseph B. Scarnati,
Thomas W. Corbett,
Louise B. Williams
Russell A. Walsh,
John E. Wetzel,
Appellants

No. 09-3018

PENNSYLVANIA PRISON SOCIETY;
DOUGLAS HOLLIS; PAROLE PLAINTIFFS,
KEITH SMITH, JACKIE LEE THOMPSON

(Pursuant to F.R.A.P. 12(A))

v.

PEDRO A. CORTES; HONORABLE EDWARD
G. RENDELL; JOSEPH B. SCARNATI,
LT. GOVERNOR; THOMAS W. CORBETT, JR.;
LOUISE B. WILLIAMS; RUSSELL A.
WALSH, Ph.D.; JOHN A. WETZEL

Pennsylvania Prison Society,
Douglas Hollis,
Keith Smith,
Jackie Lee Thompson,
Appellants

(D.C. Civ. No. 97-cv-01731)

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, BARRY, AMBRO, FUENTES, SMITH, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE and ALARCÓN*, *Circuit Judges*

The petition for rehearing filed by Pennsylvania Prison Society in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: November 23, 2010
CLW/cc: David Rudovsky, Esq.
Stephen A. Whintson, Esq.
Amy Zapp, Esq.

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* The Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Judicial Circuit, who sat by designation, as to panel rehearing only.